CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
PETITIONER,

vs.

CARL BYERLY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 9, 1939.

CERTIORARI GRANTED JANUARY 29, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939.

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT, PETITIONER,

vs.

CARL BYERLY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Southern District of Ohio	1	1
Debtor's petition	1	1
Application for restraining order	3	3
Entry restraining foreclosure proceedings	4	4
Order modifying restraining order	4	4
Approval of petition and order of reference	5	5
Report of the conciliation commissioner	6	6
Debtor's amended petition	7	7
Adjudication of bankruptcy and order of reference	8	8
Order dismissing debtor's petition and amended petition	8	8
Application for reinstatement	9	9
Order granting reinstatement	11	11
Motion to dismiss application for reinstatement	11	11
Motion for order of disclaimer	12	11
Entry finding Subsection (s), Section 75 of the Bankruptcy Act constitutional	13	13
Opinion, Underwood, J.	14	13
Order of disclaimer	18	17
Petition for rehearing	20	20
Entry dissolving temporary restraining order	25	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 12, 1940.

—6175

	Original	Print
Record from D. C. U. S., Southern District of Ohio—Continued.		
Opinion, Underwood, J.	26	25
Motion to refer to conciliation commissioner	33	32
Opinion on motion to refer, Underwood, J.	33	33
Entry overruling petition for rehearing	34	34
Omission from motion to refer to conciliation commissioner	34-a	34
Motion to refer to conciliation commissioner	35	35
Entry overruling motion to refer to conciliation commissioner	35	35
Entry overruling motion to refer to conciliation commissioner	36	36
Petition for appeal	37	37
Order allowing appeal	38	38
Assignment of errors	39	38
Bond on appeal (omitted in printing)	40	
Citation and service (omitted in printing)	41	
Entry extending time, etc.	42	40
Precipe for record	43	40
Clerk's certificate (omitted in printing)	45	
Proceedings in U. S. C. C. A., Sixth Circuit	47	43
Minute entry of argument and submission	47	43
Judgment	47	43
Opinion, Hicks, J.	48	43
Clerk's certificate (omitted in printing)	53	
Order allowing certiorari	54	48

[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 10984

In the Matter of Carl Byerly, Debtor

DEBTOR'S PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE BANKRUPTCY ACT—Filed November 19, 1934

To the Honorable Benson W. Hough, Judge of the District Court of the United States, for the Southern District of Ohio, Eastern Division:

The petition of Carl Byerly, London, R. F. D. No. 3, Ohio, in the county of Madison, and district and state of Ohio, respectfully represent:

That he is personally bona fide engaged primarily in farming operations as follows: that he lives on his mother's farm, adjoining his farm and that he operates his farm himself and for his own use and benefit: that such farming operations, occur in the county of Madison, within the said judicial district: that he is insolvent: and that he desires to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act, and to receive the benefits under the Frazier-Lemke Act.

That the schedule hereto anexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed, marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

Carl Byerly.

[Duly verified.]

[fol. 2] SCHEDULE "A"

Taxes Due State and County

Scott Slaughter, treasurer of Madison county, London, Ohio. Real and personal taxes $631.83

Secured Creditors

Union Joint Stock Land Bank, Detroit, Michigan. Real estate mortgage in the sum of $10,500.00 more or less on which there is a balance due of more or less $12,800.00

Unsecured Creditors

West Jefferson Power and Light Co., West Jefferson, Ohio. Note $74.36

Total more or less $13,526.19

[Duly certified.]

Schedule "B"

Real Estate

70 acres in Monroe Tp., No. of entry 2881
30.66 acres in Monroe Tp., No. of entry 7791
19.49 acres in Monroe Tp., No. of entry 7791
12.50 acres in Canaan Tp., No. of entry 7791
50.79 acres in Canaan Tp., No. of entry 7791

183.44 acres in Madison county, Ohio $9,150.00

Incumbrances

Mortgage on the above real estate in the sum of $12,800.00 as described in Schedule "A" hereof.

Statement

Foreclosure proceedings have been brought by the Union Joint Stock Land Bank, Detroit, Michigan, in the Court of Common Pleas, Madison county, Ohio, being Case No. 16172, Union Joint Stock Land Bank v. Carl Byerly, et al., defendant.

Sale set for Saturday, the twenty-fourth day of November, 1934.

Chattels

Two horses, one cow, one heifer, seven yearling sows, one yearling male hog, seven gilts, five feeding hogs, 30 chickens	$320.00
Farmall tractor and corn, breaking plow and double disc: one binder, 3 corn plows, one corn planter, four wagons, 3 sets harness, and other tools	320.00
1,200 bu. corn in shock and crib, 150 bu. oats, 20 tons clover hay, 3 tons loose clover hay, 900 [fol. 3] shocks fodder, 3 bu. clover seed, 3 tons baled oat straw	1,065.00
Household goods	100.00
Total	$10,955.00

[Duly certified.]

IN UNITED STATES DISTRICT COURT

APPLICATION FOR RESTRAINING ORDER—Filed November 19, 1934

Now comes Carl Byerly of R. F. D. No. 3, London, Ohio, in the county of Madison, and says that on the —th day of November, he duly filed his petition in the United States District Court, Southern District of Ohio, Eastern Division, at Columbus, Ohio, under Section 75 of the Bankruptcy Act, praying that he may be given an extension of time to pay his debts under said section, and also to receive the benefits of the Frazier-Lemke Act, and whereas the Union Joint Stock Land Bank has foreclosed on the debtor and has obtained an order of sale for real property, said sale being ordered for November 24, 1934:

Your debtor, therefore, further represents that he is attempting to effect a composition of all creditors or to secure an extension of time on his debts, but that if the said foreclosure and sale continue as scheduled, that he will not be able to carry out plans as contemplated.

Wherefore, the debtor prays that an order of this court may issue restraining the Union Joint Stock Land Bank and the sheriff of Madison county and the Court of Common

Pleas, from proceeding further under said foreclosure and order of sale until the further order of this court.

Carl Byerly.

[Duly verified.]

[fol. 4] IN UNITED STATES DISTRICT COURT

ENTRY RESTRAINING FORECLOSURE PROCEEDINGS—Filed November 19, 1934

At Columbus, Ohio, in the said district on the — day of November, 1934, before the Honorable Benson W. Hough, judge of said court, application of Carl Byerly, praying for an order to stay the foreclosure and order of sale held by the Union Joint Stock Land Bank, and the sheriff of Madison county, being Case No. 16172 on the Common Pleas Docket of Madison county, Ohio, and the sheriff under said order from proceeding with the sale or taking any further action in connection with said proceedings by virtue of Section 75 of the Bankruptcy Act, having been duly heard and considered, it is ordered that the Union Joint Stock Land Bank and the sheriff of Madison county, be and are hereby restrained from proceeding with the sale of said property described in said petition, until the further orders of this court.

Witnesseth, the Honorable Benson W. Hough, judge of the said court, and the seal thereof, at Columbus, Ohio, in said district on the fourteenth day of November, 1934.

Approved:

Hough, Judge.

IN UNITED STATES DISTRICT COURT

ORDER MODIFYING RESTRAINING ORDER ISSUED NOVEMBER 19, 1934—Issued November 23, 1934

This cause coming on to be heard upon the oral application of the Union Joint Stock Land Bank of Detroit to modify the order entered herein under date of November 19, 1934, whereby the said applicant and the sheriff of Madison county, Ohio, were restrained from proceeding with the sale of the property described in the above named debtor's petition herein, and it appearing that applicant has already

been put to considerable expense in preparing for sale of the said premises and that debtor will not be prejudiced by permitting the said property to be sold providing confirmation be not had, the court finds said application well taken, and it is hereby

[fol. 5]

Ordered, adjudged and decreed, that the restraining order entered herein under date of November 19, 1934, be and the same is hereby modified to permit the Union Joint Stock Land Bank of Detroit and the sheriff of Madison county, Ohio, to proceed to and conduct the sale of said premises in the proceedings now pending before the Madison county Common Pleas Court,

And it is further ordered that any proceedings or acts subsequent to the sale of said premises, particularly confirmation thereof, or the transfer of any title or deed thereunder be and the same are hereby enjoined and stayed until the further order of this court, in accordance with the order of November 19, 1934, except as the same is herein modified.

Hough, Judge of the United States District Court, Southern District of Ohio.

In United States District Court

Approval of Petition and Order of Reference—Filed December 14, 1934

At Columbus, Ohio, in said district, on the fourteenth day of December, A. D. 1934, before the Honorable B. W. Hough, judge of said court, the petition of Carl Byerly praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act, having been heard and duly considered, is approved as properly filed under said section.

It is therefore ordered that said matter be referred to Silas G. Williams, one of the conciliation commissioners of this court, to take such further proceedings therein as are required by said section; and that the said Carl Byerly shall attend before said conciliation commissioner forthwith at London, Ohio and thenceforth shall submit to such orders as may be made by said conciliation commissioner or by this court relating to the proceedings under this section.

Hough, United States District Judge.

[fol. 6] IN UNITED STATES DISTRICT COURT

REPORT OF CONCILIATION COMMISSIONER—Filed February 11, 1935

January 8, 1935.

At London, in said district, upon this eighth day of January, A. D. 1935, before the undersigned conciliation commissioner for Madison county, Ohio, the first meeting of creditors in the above case was had, of which due notice was given to creditors, by mail, as required by law, and the undersigned sat at the time and place mentioned in said notice, to preside at the examination of the debtor, and for such further proceedings as may be taken according to law.

There was present and represented at said meeting creditors as follows:

Mr. Kitchen, field man for Joint Stock Land Bank, and representing the secured creditor, the Union Joint Stock Land Bank of Detroit, Michigan.

The unsecured creditor was not present at this meeting.

The debtor offered as a composition and settlement, to the secured creditor $9,000.00 cash.

The meeting then adjourned until——

A second meeting was had in the above case on January 24, 1935 at 10 o'clock a. m. at my office in London, Ohio.

Mr. Floyd S. Willett of the law firm of Masters, Crane & Willett, was present and represented the secured creditor, the Union Joint Stock Land Bank of Detroit, Michigan.

The unsecured creditor was not present at this meeting, and no claim was filed, therefore their claim was not allowed.

The claim of the Union Joint Stock Land Bank of Detroit, was filed and allowed as appears by the order of allowance herein.

The debtor resubmitted his offer of composition, previously submitted in first meeting.

The offer aforesaid was not accepted by the secured creditor, the Joint Stock Land Bank of Michigan.

Consequently, the acceptance filed did not constitute a majority in number and amount of all creditors whose claims were filed and allowed, and the offer was thereupon declared not accepted.

The meeting was thereupon declared adjourned.

Silas G. Williams, Conciliation Commissioner of Madison County, Ohio.

[fol. 7] IN UNITED STATES DISTRICT COURT

DEBTOR'S AMENDED PETITION—Filed February 11, 1935

To the Honorable Benson W. Hough, Judge of the District Court of the United States for the Southern District of Ohio, Eastern Division:

In the petition of Carl Byerly of London, R. F. D. 3, Ohio, in the county of Madison, and district and state of Ohio, respectfully represents:

(1) That on November 19, 1934, the debtor duly filed in said court a petition under Section 75 of the Bankruptcy Act of 1898 as amended, the said section entitled "Agricultural Compositions and Extensions."

(2) That on February 11, 1935, the conciliation commissioner, to whom the original petition was referred, filed his report in this case to the effect that the debtor failed to obtain the acceptance of a majority in number and amount of all the creditors whose claims were effected by the composition or extension plan that was proposed.

(3) That the debtor asks relief of this honorable court to amend his petition as provided in sub-section "s" of Section 75 of the Bankruptcy Act of 1898 as amended, so that he may obtain the protection and the benefits of the said sub-section "s".

(4) He, therefore, asks to be adjudged a bankrupt as provided under said sub-section "s", Section 75.

(5) He petitions the court that all his property be appraised and that his exemptions as prescribed by state law, subject to any liens thereon, be set aside and that he be allowed to retain possession of any part or parcel of all remaining of his property and pay for the same under the terms and conditions set forth in said sub-section "s".

Wherefore, the debtor prays that the petition under said Section 75 filed on November 19, 1934, be amended to provide for this additional relief and also for such other and further relief as this honorable court may deem just and proper.

Carl Byerly, Debtor.

[Duly verified.]

[fol. 8] IN UNITED STATES DISTRICT COURT

ADJUDICATION OF BANKRUPTCY AND ORDER OF REFERENCE—Filed February 11, 1935

At Columbus, in said district, on the eleventh day of February, A. D. 1935, before the Honorable B. W. Hough, judge of said Court in Bankruptcy, the amended petition of Carl Byerly that he be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard, and duly considered, the said Carl Byerly is hereby declared and adjudged a bankrupt accordingly.

It is therefore ordered, that upon the amended petition filed in this court by or against said bankrupt on the eleventh day of February, A. D. 1935, said matter be referred to J. A. White, one of the referees in bankruptcy of this court, to take such further proceedings therein as are required by said acts; and that the said Carl Byerly shall attend before said referee on the —— day of forthwith, at Columbus, Ohio and thenceforth shall submit to such orders as may be made by said referee or by this court relating to said bankruptcy.

Witness the Honorable B. W. Hough, judge of said court, and the seal thereof, at Columbus, Ohio, in said district, on the eleventh day of February, A. D. 1935.

H. F. Rabe, Clerk. By Wm. Robinett, Jr., Deputy Clerk.

IN UNITED STATES DISTRICT COURT

ORDER DISMISSING PETITIONS—Filed August 26, 1935

This day this matter came on to be heard upon the application of the debtor herein for an order dismissing this proceedings, and it appearing to the court that the debtor heretofore filed his petition under Section 75 of the Bankruptcy Act as amended, praying for composition or extension; that upon said petition reference was duly had to and a meeting of creditors was held before Silas G. Williams [fol. 9] conciliation commissioner for Madison county, Ohio, and that debtor's offer of composition or extension was refused by a majority of creditors, both in number and amount, that the said commissioner has filed his return

showing such refusal and that thereafter the debtor amended his petition herein, and proceeded under Subsection s of Section 75 of said Bankruptcy Act, and that the said sub-section was found to be unconstitutional by the United States Supreme Court,

It is therefore ordered that the debtor's petition and amended petition be and the same are hereby dismissed and that this matter be and the same is hereby fully terminated.

Hough, United States District Judge.

IN UNITED STATES DISTRICT COURT

APPLICATION FOR REINSTATEMENT—Filed September 24, 1935

Now comes Carl Byerly the above named farmer debtor and says that his case Number 10984 was pending in this court pursuant to Section 75 of the Bankruptcy Act and that by the provisions of said act the sale of his real estate which is fully described in the schedules which accompanied his petition, which sale was about to be held by the sheriff of Madison county, Ohio, in a foreclosure case pending in the Common Pleas Court of said county, was stayed; also that this court issued an injunction restraining the sheriff of said county and the Union Joint Stock Land Bank of Detroit from proceeding further with said sale; that subsequent to the issuance of said injunction the said Union Joint Stock Land Bank of Detroit represented to him, the said Carl Byerly, while his said case was still so pending in this court that unless he the said Carl Byerly would dismiss his proceeding in this court, that is his farmer debtor proceeding in this case Number 10984, it the Union Joint Stock Land Bank of Detroit would [fol. 10] foreclose his mortgage in said Common Pleas Court case pending in Madison county, Ohio, in which said land bank was the mortgagee plaintiff; that he the said Carl Byerly relying upon the said representations of the said land bank and believing that the only way by which the foreclosure of the said land bank's mortgage could be prevented was to have said case Number 10984 in this court dismissed consented that it might be so dismissed whereupon his attorney of record in this case Number 10984 filed a motion therein and obtained an order dismissing the

same; that thereupon the said the Union Joint Stock Land Bank of Detroit contrary to the statements and representations made to the said Carl Byerly proceeded to obtain the consummation of the said sheriff sale of said real estate to it, the said the Union Joint Stock Land Bank of Detroit, accepted the delivery of a deed from said sheriff to it and recorded said deed in the office of the recorder of Madison county, Ohio; the first knowledge of the said sale came to this applicant, Carl Byerly, this week, whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court it was the dismissal thereof which allowed said sale to be consummated.

The applicant, Carl Byerly, further says that he desires the reinstatement of his said case 10984 in order that he may have the advantage of Section 75 of the Bankruptcy Act as amended August 28, 1935. He further says that he has reason to believe and does believe and therefore avers that unless said Joint Stock Land Bank of Detroit is restrained from doing so it will attempt to sell said real estate, or sell the same, or enter into some contract to sell or encumber the same, or encumber the same, or in some other manner make the recovery of said real estate by this applicant, and the application of the provisions of said Section 75 of the Bankruptcy Act to him and to said real estate as to him, impossible.

Wherefore this applicant, Carl Byerly, prays that his said proceeding in case 10984 in this court be reinstated as of the date of its said dismissal, that he may be allowed to invoke the provisions and benefits of said Section 75 as so amended, and that the said the Joint Stock Land Bank of Detroit be restrained from in any manner disposing of, deeding, mortgaging, encumbering, or contract-
[fol. 11] ing to so do, until the further order of this court.

Carl Byerly. Elmer McClain, Lima, Ohio, Attorney for Said Carl Byerly.

[Duly verified.]

In United States District Court

Order Granting Reinstatement—Entered September 24, 1935

To Clerk:

File application and reinstate case.

Set for hearing October 11, 1935 on motion to dismiss raising questions of validity of new amendment passed and effective August 28, 1935.

Hough, Judge.

In United States District Court

Motion to Dismiss Application for Reinstatement—Filed November 14, 1935

And now comes Union Joint Stock Land Bank of Detroit, against whom the debtor seeks relief under his application for reinstatement and moves the court to dismiss the said application:

First: That subsection (s) of Section 75 of the Bankruptcy Act, otherwise known as Subsection (s) of Section 203, Chapter 8, Title II of the U. S. Code, upon which the application for relief is predicated is unconstitutional.

[fol. 12] Second: That subsection (s) of Section 75 of the Bankruptcy Act does not extend or apply to property, the title to which had passed out of the debtor by deed, delivered and recorded prior to the date of the filing of the application for reinstatement.

Third: That subsection (s) of Section 75 can only extend and apply to property and property rights of debtor possessed and held by him at the date and time of the filing of the application for reinstatement.

Union Joint Stock Land Bank of Detroit, by J. E. Fouser, Vice-President.

In United States District Court

Motion for Order of Disclaimer—Filed May 8, 1936

Comes now Union Joint Stock Land Bank of Detroit, and respectfully moves the court for an order of disclaimer

under the above estate and in favor of Union Stock Land Bank of Detroit with respect to property described as follows:

(A description of the real estate is printed as part of the petition at page 2.)

Showing in support of said motion as follows:

1. That this cause is a reinstated proceeding under Section 75 of the Bankruptcy Act as amended. That following the decision of the United States Supreme Court, in the Radford case, the original proceeding in this cause was dismissed by the consent of the debtor bankrupt. That on September 10, 1935, Union Joint Stock Land Bank of Detroit applied for and secured a confirmation of a foreclosure sale of the property involved, held November 24, 1934, at which sale the bank was the purchaser and incident to which the purchase price, all taxes and costs were paid. That simultaneously therewith sheriff's deed issued to the bank and was then filed for record on September 11, 1935, at 8:17 o'clock a. m. and recorded in Volume 116, page 423, of the Madison county, Ohio, records.

[fol. 13] 2. That application for reinstatement of this cause under Section 75 of the Bankruptcy Act as amended August 28, 1935, was sworn to by the debtor on September 21, 1935, and was necessarily filed on or later than that date.

3. That at no time during the original proceeding or the reinstated proceeding did debtor bankrupt make any report in respect to his activities on the property involved nor did he make any accounting of the benefits and revenue derived therefrom; that at no time was there any administration or supervision over said debtor bankrupt or the property involved; that at no time did said debtor bankrupt give any attention to or make any payment toward the reduction of the obligation owing the bank.

4. That Section 75 of the Bankruptcy Act as amended August 28, 1935, is unconstitutional.

Masters, Crane & Willett, Attorneys for Union Joint Stock Land Bank of Detroit, By John W. Neville, Ralph G. Martin.

In United States District Court

Entry Finding Subsection (s), Section 75 of the Bankruptcy Act to be Constitutional—Filed May 21, 1936

The application of the farmer debtor for reinstatement of this case having been granted by an order signed by Judge Hough on September 21, 1935, and filed on September 23, 1935, which order reads as follows:

"To Clerk: File application and reinstate case. Set for hearing October 11, 1935 on motion to dismiss raising questions of validity of new amendment passed —— —, ——, and effective August 28, 1935.

Hough, Judge."

and Judge Hough having on October 11, 1935, ordered [fol. 14] briefs to be filed and arguments to be presented upon the question of the constitutionality of the said act approved August 28, 1935, being subsection (s) of Section 75 of the Bankruptcy Act, and briefs having been filed and arguments presented orally to Judge Robert R. Nevin of this court on December 3, 1935, subsequent to the death of Judge Hough, and the same having been considered, therefore

The court finds and concludes that subsection (s) of Section 75 of the Bankruptcy Act, as amended August 28, 1935, is constitutional. Exceptions to Union Joint Stock Land Bank of Detroit.

Approved:

Robert R. Nevin, District Judge. Elmer McClain, Attorney for Carl Byerly, Farmer-Debtor.

In United States District Court

Opinion—Filed October 14, 1936

Underwood, District Judge:

This is a proceeding under Section 75 of the Bankruptcy Act. On March 1, 1924, Carl Byerly, debtor herein, executed and delivered to the Ohio-Pennsylvania Joint Stock Land Bank of Cleveland, a certain note and mortgage in the sum of $12,000 as security for a loan of the same

amount. The note and mortgage were subsequently assigned to the Union Joint Stock Land Bank of Detroit.

The loan became delinquent September 1, 1932 and foreclosure proceedings were instituted by the Union Joint Stock Land Bank of Detroit in the Common Pleas Court of Madison county, Ohio. Judgment was rendered against the debtor in favor of the bank and the property was advertised for sale. Just prior to the sale, the debtor filed his petition in this court under Section 75 of the Bankruptcy Act. A restraining order issued out of this court direct-
[fol. 15] ing the bank and the sheriff of Madison county to proceed no further with the sale until further order of the court.

Subsequently, upon motion of the bank, the restraining order was modified to permit the bank and the sheriff of Madison county to proceed with the sale of the premises, but enjoining and staying the confirmation of said sale or the transfer of any title or deed thereunder. The sale was held under the modified order and the bank became the purchaser.

The cause pending in this court having been referred to a conciliation commissioner, creditors' meetings were held but the debtor's offer of composition was rejected. This fact was duly reported to the court by the commissioner, February 11, 1935. Whereupon the debtor petitioned for leave to amend his petition and proceed under Subsection (s) of Section 75. Leave was granted and adjudication was entered February 11, 1935.

Following the decision of the Supreme Court in Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, holding Subsection (s) unconstitutional, the instant case came on for hearing in this court upon application of the debtor to have his petition and amended petition disinissed upon the ground that his offer of composition had been rejected and that the subsection under which his proceedings were then pending, had been held to be unconstitutional. An order dismissing the proceedings was entered by the court August 26, 1935, with the approval of debtor's counsel. The bank then secured confirmation of the sheriff's sale; a deed was executed and delivered by the sheriff and it was recorded September 11, 1935, in the records of Madison county.

The act having been amended and a new Subsection (s) enacted, the debtor filed his application herein for reinstate-

ment, September 24, 1935. In his application the debtor alleges that he had been informed by the bank that unless his proceedings in this court were dismissed, the bank would complete its foreclosure proceedings in the state court; that he asked dismissal solely for this reason, thinking it the only way to save his farm. The debtor further alleges that upon changing counsel, he found that the dismissal requested upon advice of his first counsel, was the circumstance which made consummation of the sale possible. A motion was filed by the bank to dismiss said application for reinstatement upon three grounds; that the new Subsection (s) is unconstitutional; that it could not apply in this case since title had passed prior to the application [fol. 16] for reinstatement; and that it could have no application to this case, since the debtor did not possess and hold the property in question at the time of filing his application for reinstatement.

The application for reinstatement was set for hearing October 11, 1935, by my predecessor Judge Hough, "on motion to dismiss, raising question of validity of new amendment passed," together with several similar cases. Subsequent to the death of Judge Hough, Judge Nevin found the act as amended constitutional, and an entry to that effect was made May 21, 1936. It is considered that reinstatement became effective at that time.

The bank filed its motion for an order of disclaimer in its favor of the mortgaged premises purchased by it in the foreclosure proceeding conducted in the state court. The cause is now pending before this court on said motion, which was argued to the court June 19, 1936.

Coming now to the questions involved at the present time, it is apparent that during the pendency of the original action here and the term of the restraining order, all further proceedings in the state court were held in abeyance; title could not pass, the sale could not be confirmed, and deeds could not be delivered. This was the situation existing up to the time of the decision in the Radford case. If the effect of the Radford decision was to void the entire proceeding here, and the restraining order theretofore issued (and the court does not so hold), then the jurisdiction of this court was ended and representations made by the bank or others could not alter that fact. If, however, the restraining order was still in effect under remaining

provisions of Section 75, then the bank could not proceed until the order had been terminated. This was accomplished by the order of dismissal entered August 26, 1935 at the request of the debtor. Hence it becomes apparent that no matter what reasoning is applied, the jurisdiction of this court in the matter ended as of August 26, at the latest.

In arriving at this conclusion, it is immaterial whether the debtor acted upon misapprehension either of law or of fact; whatever his intent, his motive, or his purpose, the granting of his motion effectively concluded the remaining jurisdiction of this court in the case and clearly voided the restraining order.

Therefore, when the sale was consummated in the state court on September 10, 1935, nothing was pending here; this court being at the time entirely without jurisdiction, the state court was free to act and insofar as this proceeding is concerned the title passing to the bank was valid. [fol. 17] Upon reinstatement here, the debtor may have placed himself within the jurisdiction of this court, but he was powerless to bring property formerly owned by him within the jurisdiction of the court after the sale had been confirmed and title had passed.

Attention may be directed to a long line of decisions holding Bankruptcy Courts to be without jurisdiction after title has passed, the sale confirmed and deeds delivered. Among these may be cited: In Re: Knauft (D. C. So. Dist. Cal.) 10 F. Supp., 785; Compton v. Birnie Trust Company, et al. (C. C. A. 4), 76 F., (2d), 639; In Re: Borgelt (D. C. So. Dist. Ill.), 10 F. Supp., 113; Glenn v. Hollums and Glenn v. Eaves (C. C. A. 5), 80 F. (2d), 555; In Re: Randall (D. C. West. Dist. Pa.); In Re Thisler (D. C., Kans.); In Re Chaboya (D. C., So. Dist. Cal.), 9 F. Supp., 174; and In Re Coller (D. C., N. Y.), 8 F. Supp., 447.

Recent cases have applied the same reasoning in instances where jurisdiction of the Bankruptcy Court has been terminated and reinstatement is sought after foreclosure under Section 75 as amended. In the case of Du Bose v. Carolinas Land Bank, 31 A. B. R. (N. S.), 17, the Circuit Court of Appeals for the Fourth District, held that Section 75 (s) as amended was not retroactive and the court was without jurisdiction where foreclosure and sale had been completed after dismissal under old Section 75 (s)

but prior to passage of new Section 75 (s) and reinstatement thereunder. The District Court for the Western District of New York in the case of In Re Weise, 12 Fed. Supp., 871, held that after foreclosure sale the debtor was not entitled to the reopening of Section 75 (s) proceeding in order to take advantage of the amendment. In Re Ledwidge (D. C., W. Dist. Mo.), decided November 1, 1935, held that proceedings brought under the Frazier-Lempke Act will not be reinstated where there has been a final order of dismissal upon which the secured creditor has acted.

In view of the cases cited and the circumstances of this particular case, the court is compelled to hold that irrespective of the motives or purposes which led the debtor to move for the dismissal of his proceedings herein, the cause passed from the jurisdiction of this court with the entry of dismissal on August 26, 1935; that so far as this proceeding is concerned, a good title was conveyed to the bank during the interval when this court had no jurisdiction; and that reinstatement in this court under the circumstances, did [fol. 18] not and could not, bring the property to which title has passed within its jurisdiction. A decision otherwise, in the opinion of the court, would require a finding here that the title remains in the debtor, despite the decision of the state court. This the court is unable to do in what must be deemed in this proceeding, to be a collateral attack on the title passed in the state court.

It is the decision of the court, therefore, that it is without jurisdiction of the property in question and that the motion of the Union Joint Stock Land Bank for an order of disclaimer is well taken; that it ought to be, and the same hereby is, granted. An order of disclaimer in favor of the bank will issue. Entry accordingly.

Mell G. Underwood, Judge.

IN UNITED STATES DISTRICT COURT

ORDER OF DISCLAIMER—Filed October 22, 1936

This day this matter came on to be heard by the court upon the motion of the Union Joint Stock Land Bank of Detroit for an order of disclaimer herein in favor of the

Union Joint Stock Land Bank of Detroit with respect to property described as follows:

(A description of the real estate is printed as a part of the petition at page 2.)

Said motion was heard by the court together with argument of counsel thereon and the court being fully advised in the premises finds that this is a proceeding under Section 75 of the Bankrupt[illegible] Act; that on March 1, 1924, Carl Byerly, debtor herein, executed and delivered to the Ohio-Pennsylvania Joint Stock Land Bank of Cleveland, a certain note and mortgage in the amount of $12,000.00 as security for a loan of the same amount; that said note and mortgage were subsequently assigned to the Union Joint Stock Land Bank of Detroit.

The court further finds that said loans became delinquent September 1, 1932 and foreclosure proceedings were insti- [fol. 19] tuted by the Union Joint Stock Land Bank of Detroit in the Common Pleas Court of Madison county, Ohio; that judgment was rendered against the debtor in favor of the bank and the property advertised for sale; that just prior to the sale, the debtor filed his petition in this court under Section 75 of the Bankruptcy Act and a restraining order issued out of this court directing the bank and the sheriff of Madison county to proceed no further with the sale until further order of the court; that subsequently upon motion of the bank, the restraining order was modified to permit the bank and the sheriff of Madison county to proceed with the sale of the premises, but enjoining and staying the confirmation of said sale or the transfer of any title or deed thereunder; that the sale was held under the modified order and the bank became the purchaser.

The court further finds that the cause pending in this court having been referred to a conciliation commissioner, creditors' meetings were held but the debtor's offer of composition was rejected; that this fact was duly reported to the court by the commissioner, February 11, 1935. Whereupon the debtor petitioned for leave to amend his petition and proceed under Subsection (s) of Section 75, and leave was granted and adjudication entered February 11, 1936.

The court further finds that following the decision of the Supreme Court of the United States in Louisville Joint Stock Land Bank v. Radford, 295 U. S., 555, holding Subsection (s) unconstitutional, the instant case came on for

hearing in this court upon application of the debtor to have his petition and amended petition dismissed upon the ground that his offer of composition had been rejected and that the subsection under which his proceedings were then pending, had been held to be unconstitutional; that an order dismissing the proceedings was entered by this court August 26, 1935, with the approval of the debtor's counsel; that the bank then secured confirmation of the sheriff's sale; a deed was executed and delivered by the sheriff covering the real estate hereinbefore described, and it was recorded September 11, 1935 in the recorder's office of Madison county, Ohio.

The court further finds that the act having been amended and a new Subsection (s) enacted, the debtor filed his application herein for reinstatement September 24, 1935 and said cause was thereafter reinstated by this court.

The court further finds that when the sale of the above [fol. 20] described real estate was consummated in the Court of Common Pleas, Madison county on September 10, 1935, no proceeding was pending in this court and this court at said time was entirely without jurisdiction in regard to said real estate; that the reinstatement of this proceeding did not give this court further jurisdiction over said real estate; that this cause passed from the jurisdiction of this court with the entry of dismissal on August 26, 1935; that so far as this proceeding is concerned a good title was conveyed to the Union Joint Stock Land Bank of Detroit during the interval when this court had no jurisdiction and that reinstatement in this court under the circumstances did not and could not bring the property to which title had passed, within its jurisdiction.

It is therefore ordered, adjudged and decreed that the motion of the Union Joint Stock Land Bank of Detroit for an order of disclaimer by this court of all right, title and interest in and to the real estate hereinbefore described be and the same is hereby sustained and it is further ordered, that all right, title and interest of the debtor, Carl Byerly and of this court in and to the real estate hereinbefore described be and the same is hereby disclaimed in favor of the Union Joint Stock Land Bank of Detroit.

To all of which findings and order, the debtor herein excepts.

Mell G. Underwood, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR REHEARING—Filed October 26, 1936.

To the Honorable Mell G. Underwood, Judge of said Court:

The petition of Carl Byerly, farmer debtor bankrupt herein, respectfully shows:

1. That on May 8, 1936, the Union Joint Stock Land Bank of Detroit, one of the secured creditors herein, filed its motion for an order of disclaimer in its favor with respect [fol. 21] to the real estate of the debtor, described in said motion, consisting of 183.44 acres more or less.

2. That said motion was heard on June 19, 1936.

3. That on October 22, 1936, an "Order of Disclaimer" was approved by this court and filed in the office of the clerk thereof.

4. That the said Carl Byerly, farmer debtor bankrupt, moves for a rehearing of said motion upon the following grounds:

1. That there was on the date of the filing of said motion in this court, then pending and there still is pending, a motion in the Common Pleas Court of Madison county, Ohio, praying that the confirmation, order for deed, and the deed of the sheriff of said county to the said Union Joint Stock Land Bank of Detroit be set aside and be held for naught. That said motion was filed in the said Common Pleas Court of Madison county, Ohio, on the twenty-third day of September, 1935, and set for hearing at 10:00 a. m. on October 19, 1935. That prior to the date set for said hearing on said motion in the Common Pleas Court of Madison county, Ohio, the said Union Joint Stock Land Bank of Detroit applied to the judge of said Common Pleas Court and requested that the hearing of said motion be deferred until after the constitutionality of Subsection (s) of Section 75 of the Bankruptcy Act, passed August 28, 1935, should be finally determined by the courts of the United States. That said application of the said Union Joint Stock Land Bank of Detroit was granted and said motion remains pending and unheard to this day.

2. That the said "Order of Disclaimer" issued by this court is based upon a misapprehension of the facts. The

decision of the court bases the right to have such an order of disclaimer upon the ground that the farmer debtor bankrupt had approved the dismissal of his farmer debtor proceedings before the enactment of the present Subsection (s) of Section 75 of the Bankruptcy Act. Whereas paragraph (5) of Section 6 of said act of August 28, 1935, provides that "* * * all cases that have been dismissed by any * * * court because of the Supreme Court's decision holding the former Subsection (s) unconstitutional, shall be promptly reinstated * * *". That the said order dismissing the proceedings which had been pending under the original Subsection (s) of Section 75 stated "* * * and that thereafter the debtor amended his petition herein and proceedings under Subsection (s) of Section 75 of said [fol. 22] Bankruptcy Act and that the said subsection was found to be unconstitutional by the United States Supreme Court, it is therefore ordered that the debtor's petition and amended petition be and the same are hereby dismissed and that this matter and the same is hereby fully terminated." That said order clearly shows that said dismissal was solely predicated upon the decision of the United States Supreme Court holding said original Subsection (s) to be unconstitutional, and that clearly by the terms of the present Subsection (s) set forth above the farmer debtor bankrupt's proceedings herein were entitled to be reinstated regardless of such order of dismissal.

3. That the fact that said farmer debtor bankrupt assented to the formal approval of said entry by his counsel could not in any way deprive him of the benefits of the present Subsection (s) according to the terms thereof. That such assent so given by the farmer debtor bankrupt to his counsel was based upon misrepresentation to him by certain representatives of the Union Joint Stock Land Bank of Detroit whereby it was stated to him that if he did not consent to such approval of said entry by his counsel, his farm would be lost to him by foreclosure in the Common Pleas Court, but that if he would give such assent the farm would be saved from foreclosure, and that he gave such assent to said order of dismissal for the purpose of saving his said farm from foreclosure and for no other reason.

4. That in addition to all of the foregoing the said farmer debtor bankrupt, after his motion for reinstatement in this court had been allowed by Judge Hough, who was then the

judge presiding in this court on the date of the allowance of said motion, to wit, on August 28, 1935, said farmer debtor bankrupt discovered what he did not then know, namely, that there had been an understanding and agreement between the counsel for said Union Joint Stock Land Bank of Detroit and counsel for said debtor bankrupt that, even though said order of disclaimer should be approved and filed in this court, the Union Joint Stock Land Bank of Detroit would not seek or obtain a confirmation of the sheriff's sale to the said Union Joint Stock Land Bank of Detroit, and order for deed to be executed and delivered to it by the sheriff of Madison county, Ohio, in which county said foreclosure proceedings were then pending.

5. That when the farmer debtor bankrupt's petition under Section 75, Subsections (a) to (r) of the Bankruptcy Act, was originally filed in this court Judge Hough, who was [fol. 23] then the judge of this court, issued an injunction restraining the sale of said real estate in said foreclosure proceedings which were then pending in Madison county, Ohio, and thereafter, contrary to the provisions of said Section 75, Subsections (a) to (r), an order was issued purporting to permit the sheriff to proceed with said sale but continuing the prohibition against the confirmation of any sale that might be held and the execution and delivery of any deed based thereon. Whereas, Sub ection (o) of said Section 75 provides that:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be * * * maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court: * * *

(2) Proceedings for foreclosure of a mortgage on land * * *

(5) Proceedings to sell land under or in satisfaction of any judgment * * *"

On October 17, 1936, the original of a proposed "Order of Disclaimer" was presented to counsel for the farmer debtor bankrupt by counsel for the said Union Joint Stock

Land Bank of Detroit with the statement that if it should not be approved within "one week" a copy of said order would be entered with the court. That before the expiration of said "one week," to wit, on October 20, 1936, counsel for said farmer debtor bankrupt, together with counsel for said Union Joint Stock Land Bank of Detroit presented themselves at the office of the judge of this court and said counsel for the farmer debtor bankrupt requested of Mr. Robert Newlon, law clerk or assistant to the judge of this court, an opportunity to present objections to the form of said proposed "order of Disclaimer" to the judge of this court but was refused an opportunity so to confer with the judge of this court upon the ground that probably satisfactory arrangements could be arrived at by conferring with said Robert Newlon. That counsel for the farmer debtor bankrupt explained to said Robert Newlon and to counsel for said bank that in the event the confirmation of said sheriff's deed should be set aside by the Common Pleas Court of Madison county, the wording of said proposed "Order of [fol. 24] Disclaimer" would allow it to be interpreted to mean that said real estate could not be reinstated in the proceedings pending in this court and that the jurisdiction of this court had been finally disclaimed and could not be reasserted. That counsel for the farmer debtor bankrupt herein proposed that the following words should be added at the end of the first paragraph on page 4 of said proposed "Order of Disclaimer" after the word "Detroit," and changing the period to a comma: "Provided that if the state of Ohio shall determine that said sheriff's deed is void and sets the same aside the said real estate shall revert to the jurisdiction of this court in these proceedings." That it was stated by counsel for said bank and by said Robert Newlon that the order as originally presented meant the same without as with the addition of said proviso just set forth herein. That said counsel for said bank requested opportunity to communicate with his associate counsel in Detroit. Whereupon he notified counsel for the farmer debtor bankrupt that said co-counsel would not assent to the addition of said proviso but that he, the counsel for the said bank who had so conferred with said Robert Newlon, had no objection to said proviso going in if the court should include it, and thereupon counsel for the farmer debtor bankrupt left with the said Robert Newlon the said original pro-

pbsed "Order of Disclaimer" which, until said time he, the counsel for the farmer debtor bankrupt, had retained in his possession with the understanding that if the judge of the court should assent to the inclusion of said proviso in said proposed "Order of Disclaimer," the same should be inserted, but if not, the said "Order of Disclaimer" should be returned to the counsel for the farmer debtor bankrupt and he then would be afforded opportunity to confer personally with the judge of this court in the presence of counsel for said bank and that the time within which said entry might be considered by counsel before entry thereof should be properly extended beyond the "one week" referred to above.

Counsel for the farmer debtor bankrupt stated to said Robert Newlon and to counsel for said bank that he feared that other counsel might have a different understanding of said proposed "Order of Disclaimer" and would insist upon a different interpretation thereof, which might cause serious loss to the farmer debtor bankrupt herein. That on October 21, one day before said "Order of Disclaimer" was filed in this court as above stated, certain counsel for said bank, [fol. 25] who was a different individu. . from the counsel hereinbefore referred to who was present at the conference with said Robert Newlon, represented to the sheriff, and possibly to other officials of Madison county, Ohio, that "the federal court had thrown Byerly's case out of court" and also obtained the services of the sheriff of Madison county, Ohio, to go out to the farm of the farmer debtor bankrupt and there order his hired workmen to quit work. That said acts were done notwithstanding the fact that the farmer debtor bankrupt's motion to have said order of confirmation set aside and vacated by the Common Pleas Court of Madison county, Ohio, was then pending and had not yet been heard.

Wherefore the petitioner prays that the court will grant a rehearing of said motion and allow the objections thereto on his behalf to be presented to this court.

Elmer McClain, Attorney for Carl Byerly, Farmer Debtor Bankrupt.

[Duly verified.]

IN UNITED STATES DISTRICT COURT

ENTRY DISSOLVING TEMPORARY RESTRAINING ORDER—Filed November 6, 1936

This day this cause came on to be heard upon the motion of the defendant, Carl Byerly, for an order of this court to vacate the decree of confirmation of the sale and order for deed heretofore made in this case, and upon which motion a temporary restraining order was granted; said motion was submitted on affidavits, oral testimony and arguments of counsel, and the court on consideration thereof, and being fully advised in the premises, finds that said motion is not well taken and the same is overruled and the temporary restraining order dissolved.

To which finding and order the defendant, Carl Byerly, excepts.

Approved: James F. Bell, Judge.

[fol. 26] IN UNITED STATES DISTRICT COURT

OPINION—Filed April 16, 1937

UNDERWOOD, District Judge:

This is a proceeding under Section 75 of the Bankruptcy Act, as amended. Carl Byerly was the owner of a certain farm which had been mortgaged to the Ohio-Pennsylvania Joint Stock Land Bank of Cleveland. Upon the default of said mortgagor under the terms of the mortgage, a suit in foreclosure was filed by the bank in Common Pleas Court of Madison county, Ohio, September 1, 1932. Judgment was rendered against the mortgagor in favor of the bank and the farm was advertised for sale under order of the state court.

Just prior to the sale, Byerly filed his petition in this court under Section 75 of the Bankruptcy Act, as amended. A restraining order issued out of this court directing the sheriff of Madison county to proceed no further with the sale until further order of the court.

Upon application of the bank, and before any hearing had been held by the conciliation commissioner or any report had been made by the commissioner, my predecessor, Judge Hough, granted a modification of the restraining

order permitting the sheriff to proceed with the sale, but specifically prohibiting confirmation, delivery of deed, or passage of title. The sale was held under the order as modified and said farm was purchased by the bank, further proceedings being stayed in accordance with the terms of said order.

The case was then referred to a conciliation commissioner, creditors' meetings were held and the debtor's offer of composition was rejected. This fact the commissioner reported to the court February 11, 1935. On the same day, the petitioner, by leave of court, amended his petition under Subsection (s) and was adjudicated a bankrupt. At this stage of the proceedings, the Supreme Court of the United States held Subsection (s) unconstitutional in the Radford case, 295 U. S., 555. Whereupon the debtor applied to this court asking that his petition and amended petition be dismissed upon the ground that his offer of composition had been rejected and that the subsection under which his proceedings was then pending had been declared unconstitutional. An order dismissing the proceedings was entered by the court August 26, 1935, with the approval of debtor's counsel. The bank then secured confirmation of the sheriff's sale; a deed was executed and delivered by the sheriff and it was recorded September 11, 1935 in the records of Madison county.

After the act was amended and a new Subsection (s) added, [fol. 27] the debtor filed his application herein for reinstatement, September 24, 1935. In his application the debtor alleged that he had been informed by the bank that unless his proceedings in this court were dismissed, the bank would complete its foreclosure proceedings in the state court; that he asked dismissal solely for this reason, thinking it the only way to save his farm. The debtor further alleged that upon changing counsel, he found that the dismissal requested upon advice of his first counsel, was the circumstance which made the confirmation of the sale possible. A motion was filed by the bank to dismiss said application for reinstatement upon three grounds: that the new Subsection (s) was unconstitutional; that it could not apply, since title had passed prior to the application for reinstatement, and that it could have no application, since the debtor did not possess and hold the property in question at the time of filing his application.

Said application for reinstatement was set for hearing October 11, 1935, by my predecessor, Judge Hough, "on motion to dismiss, raising question of validity of new amendment passed," together with several similar cases. Subsequently Judge Hough died and Judge Nevin found the act as amended constitutional, and an entry to that effect was made May 21, 1936. It is considered that reinstatement became fully effective at that time, although, if it be considered that reinstatement became effective on September 23, 1935, as contended by the debtor, the position of the debtor is not changed inasmuch as reinstatement took place after confirmation of the deed and after delivery and record.

The bank filed its motion for an order of disclaimer in its favor of the mortgaged premises purchased by it in the foreclosure proceedings conducted in the state court. The motion for an order of disclaimer was granted by this court, October 9, 1936. The debtor filed his petition herein, October 26, 1936 praying for a rehearing upon the motion of the bank. The matter was orally argued to the court and briefs were submitted by both parties.

In support of his petition, the debtor argues that a motion is pending in the state court to have confirmation, order for deed, and the deed of the sheriff, set aside and held for naught. The motion was overruled by the state court and although counsel for the debtor has expressed his intention to perfect his appeal therefrom, it is not considered that either the pendency of such appeal or the pros-[fol. 28] pective action of the state courts is determinative of the question now before this court.

As a second ground, the debtor alleges that his case was dismissed because of the unconstitutionality of Section 75 (s), and for that reason, should be reinstated as a matter of course under the new Subsection (s). The order of dismissal entered by this court affirmatively shows that dismissal was ordered upon three grounds: request of the debtor, failure to reach a composition agreement with his creditors, and the unconstitutionality of the former Subsection (s). However, this contention is not material, since this court has previously held that reinstatement was effective, but that reinstatement in this court, under the circumstances, did not and could not, bring the property to which title had passed within its jurisdiction. The contention of the debtor, while in form complaining of a supposed denial

of reinstatement, which does not exist, is in reality a complaint against the inability of this court to retake into its jurisdiction property which has passed irrevocably from it.

For his third ground, the debtor alleges that his request for dismissal was based upon a misrepresentation made to him by agents or attorneys for the bank, that foreclosure in the state court would proceed unless he had his case in this court dismissed. This ground has been heretofore considered by this court and held not to be well taken. The allegation amounts in fact to a charge of misrepresentation of law. Perhaps it is sufficient to say that the debtor was represented by counsel who approved the order of dismissal, yet in the oral argument, it is asserted that he relied upon advice of attorneys for the bank. If that be true, he was certainly without right to do so, but if he so chose, he cannot now be heard to complain of his choice. Were the court to hold otherwise, it would be a simple matter for a party to place himself in position where he would always be sure of endless recourse by simply claiming that he conferred with attorneys for the opposition and in some measure relied upon their advice rather than that of his own counsel. Many cases have been cited by counsel for the debtor in support of his claim that where one knowing the law, deceives one not knowing the law, relief will be granted. Such cases have no application where one represented by counsel chooses to rely upon the advice of others.

As a fourth ground, the debtor alleges that there was an understanding between his counsel and the bank to the [fol. 29] effect that foreclosure would not be proceeded with, if the case in this court was dismissed. But he further asserts that he learned of the alleged agreement two days after dismissal, August 28, 1935. It is obvious that he did not rely upon that representation when he requested dismissal on August 26. If there was a valid and binding agreement, the debtor has his proper remedy but it does not appear to be an attack upon dismissal at his request nor by complaint here against the subsequent and inevitable misfortunes following it.

The fifth ground urged includes two allegations: first, that the order of disclaimer should have provided for the return of the farm in question to the jurisdiction of this court, in case the deed executed by order of the state court should be set aside by that court. Upon disagree-

ment between counsel, this court entered what is considered to be a proper order and the court is still of that opinion.

The second allegation of the fifth ground is, that the modification of the restraining order granted by my predecessor was contrary to law, and the proceedings of the state court therefore without effect. It is this allegation which it is deemed necessary to consider at some length.

Section 75 (n) provides that the filing of the farmer-debtor's petition or answer shall immediately subject the farmer and all his property to the exclusive jurisdiction of the court. Subsection (o) provides that except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, certain proceedings shall not be instituted, or if theretofore instituted, shall not then be maintained. The proceedings forbidden include proceedings for the foreclosure of a mortgage on land and proceedings to sell land under or in satisfaction of any judgment. It is quite evidently the intent of the law that the status quo shall be maintained until the commissioner has had an opportunity to fully investigate and report his findings to the court.

In the instant case foreclosure had been completed, the decree had issued, and advertising published before the debtor filed his petition herein. The only authority granted by the modified order of this court was for the sheriff to conduct the sale, which amounted to no more than receiving bids, all authority to pass title being expressly withheld. No change was authorized or permitted by this court in the status of the debtor or his property. The following [fol. 30] quotation from the brief of the debtor may be cited as authority:

"24 Ohio Jurisprudence, Judicial Sales, Section 105, page 79. The purchaser obtains no vested right until after the sale is confirmed, and, if the confirmation is refused, the rights of the purchaser fall to the ground. A bid, though the highest, being but an offer to purchase, subject to the approval or disapproval of the court, the accepted bidder whose bid has been returned to the court as the best offer acquires by the mere acceptance of his bid no independent right to have his purchase completed, but is merely a preferred proposer until confirmation of the sale by the court. By acceptance of his bid, and the subsequent confirmation of the same by the court, the bidder becomes the purchaser

in the full sense of the term, and the substantial owner of the property sold, with the right of possession, though his right may not be asserted against the former owner until the due execution of a deed."

Therefore the modification granted by this court did no more than authorize the sheriff to accept bids, while at the same time holding the debtor and his property within the jurisdiction of this court and maintaining the status quo. No injury or prejudice to the debtor resulted; nothing happened to change the relation between the debtor and his property until August 26, 1935, when the debtor by his own act, removed both himself and his property from the jurisdiction of this court. It was the order of dismissal, not the order of modification, which permitted the bank to proceed with its foreclosure sale. This fact is supported by the following quotation from debtor's memorandum filed July 2, 1936:

"The farmer debtor, Byerly, immediately consulted other counsel and for the first time learned that it was his consent to the dismissal in the federal court which permitted the Common Pleas Judge to confirm the sheriff's sale and the sheriff to deliver the deed."

and from his application for reinstatement filed September 24, 1935:

"whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court it was the dismissal thereof which allowed the said sale to be consummated."

[fol. 31]. It is noted also, that the order of modification complained of, was entered November 23, 1934 and no objection was made thereto by the debtor prior to his voluntary dismissal August 26, 1935, a period of approximately nine months within which any valid objection could have been made and acted upon. But the first objection to such modification appearing in the record is found in the debtor's petition for rehearing filed October 26, 1936, nearly two years after the order complained of. Prior to that time, the debtor rested his claims upon the alleged irregularities involved in the dismissal. Even going to the extent of ad-

mitting estoppel, if the dismissal were found to be regular, as evidenced by the following quotation from his memorandum of July 2, 1936:

"If the farmer debtor, knowing what he was doing, had consented to the dismissal of his federal court proceedings and permitted the sheriff's sale to be confirmed and the deed delivered by the sheriff he would be estopped to invoke the provisions of the new Section 75 (s)."

Now by a complete reversal of reasoning, it is here contended that not only is the debtor not estopped by his dismissal which this court has held to be regular, but it is contended that the state court was without jurisdiction because of the order of modification. It must be conceded, however, that the courts of the state of Ohio, do have jurisdiction in foreclosure matters, subject to the paramount bankruptcy jurisdiction of the federal courts. It must be conceded also, that the state court had jurisdiction when it entered its decree in foreclosure before the debtor filed his petition herein, and when, after dismissal in this court, the sale was confirmed and deed ordered. The only part of the proceeding which could possibly be questioned, is the taking of bids by the sheriff at the so-called "sale", and that was done under, and subject to the paramount federal jurisdiction.

It is apparent also, that the bank would have been free to proceed with its completion of the foreclosure sale, after dismissal in this court regardless of whether or not the order of modification had been issued. It may be considered also, that the debtor had exhausted his remedy under all subdivisions of the act to Subsection (s), and if neither the order of dismissal nor the order of modification had been entered, the case could have been dismissed upon motion of any interested party after Subsection (s) had been declared unconstitutional, resulting also in completion of the foreclosure sale.

[fol. 32] The case of Hoyd v. The Citizens Bank of Albany Company decided by the United States Circuit Court of Appeals, Sixth Circuit, March 12, 1937, is cited by the debtor as controlling herein, but that case is clearly distinguishable from the one under consideration. In the Hoyd case, an injunction had been issued by the court after sale and before confirmation. Then the court, without hearing

or report of the conciliation commissioner dissolved the injunction, permitting confirmation; the final and specific act by the state court which terminated the rights of the debtor in his property and rendered all further efforts under Section 75 in the Federal Court useless and impotent. The sole question in that case was whether or not the federal court could permit the final act; confirmation, by dissolving its injunction before hearing and report of the commissioner.

In the instant case, the court did not dissolve its injunction; it did not permit the relation of the debtor to his property to be disturbed; it permitted no sale, in any true sense of the word; nor did the court surrender jurisdiction over either the property or the debtor. In the Hoyd case, the act which permitted confirmation; cut off the debtor's rights, and left him without recourse, was the act of the court in dissolving its injunction. In the instant case, the act which removed the property of the debtor from the jurisdiction of this court; permitted confirmation, and brought injury to the debtor, was his own act requesting dismissal. No voluntary dismissal was involved in the Hoyd case.

The question of sale was not before the Circuit Court of Appeals in the Hoyd case except insofar as sale meant confirmation and the actual passage of title. Sale in the sense in which it took place in the Byerly case, being the formal acceptance and offer of bids, preceded the filing of Hoyd's petition under 75 and could not have been contemplation of the upper court in that case.

After careful consideration, this court finds that said debtor's petition for a rehearing ought to be, and the same hereby is, denied.

Entry accordingly.

Mell G. Underwood, U. S. District Judge.

[fol. 33] In United States District Court

Motion that Case be Referred to Conciliation Commissioner—Filed April 17, 1937

1. Now comes the said farmer debtor bankrupt, Carl Byerly, and respectfully moves that the proceedings herein

be referred to a conciliation commissioner pursuant to Subsection (s) of Section 75 of the Bankruptcy Act.

2. Said Carl Byerly respectfully moves the court to refer to the conciliation commissioner for proper proceedings pursuant to Subsection (s) of Section 75 of the Bankruptcy Act, his property described in his schedule which accompanied his petition filed herein on November 19, 1934, having particular reference to the real estate referred to and set forth in Schedule B of said petition, which real estate is more particularly described as follows:

(A description of the real estate is printed as a part of the petition at page 2.)

Carl Byerly, by Elmer McClain, His Attorney.

[Duly verified.]

IN UNITED STATES DISTRICT COURT

OPINION—Filed May 1, 1937

The motion of the farmer-debtor to refer this case to a conciliation commissioner is overruled for the following reasons:

(1) On October 22, 1936, this court entered an order of disclaimer with respect to the property described in the schedules accompanying the petition of this farmer-debtor and, therefore, there is no real estate over which this court has jurisdiction.

(2) The farmer-debtor has failed to comply with Rule 12, Paragraph 3 of the rules of this court relative to filing a brief statement of the grounds upon which a motion is based, together with citations of authorities.

[fol. 34] It does not appear that a copy of this motion was served upon opposing counsel and the court is advised that no copy was so served.

An entry may be prepared accordingly.

Mell G. Underwood, Judge, U. S. D. C.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING PETITION FOR REHEARING—Filed May 6, 1937

This day this matter came on to be heard upon the petition for rehearing of the order of disclaimer, heretofore entered by the court October 22, 1936, which petition was filed by farmer debtor bankrupt, Carl Byerly, and said petition for rehearing was heard upon oral arguments and briefs of counsel. The court, upon consideration thereof and being fully advised in the premises finds that said petition for rehearing is not well taken and the same is hereby overruled and denied.

To which finding and order of the court, the bankrupt, Carl Byerly, excepts.

Mell G. Underwood, United States District Judge.

[fol. 34a] IN UNITED STATES DISTRICT COURT

Omission from Motion that Case be Refered to Conciliation Commissioner

STATEMENT OF GROUNDS OF MOTION

On the nineteenth day of November, 1934, when the original petition of Carl Byerly, the farmer debtor bankrupt herein, was filed, he had a property right in the real estate described in the petition and in this motion, which property right has remained in him at all times from said date to the present moment.

On November 23, 1934, an order issued from this court purporting to order: "That the restraining order entered herein under date of November 19, 1934, be and the same is hereby modified to permit the Union Joint Stock Land Bank of Detroit and the sheriff of Madison county, Ohio, to proceed to and conduct the sale of said premises in the proceedings now pending before the Madison county Common Pleas Court." Such order was issued from this court without a petition having been made to and granted by the judge thereof after hearing and report by the conciliation commissioner, as prescribed by law, and was, therefore, void, and of no effect.

CITATIONS OF AUTHORITIES RELIED UPON

Decision of the United States Circuit Court of Appeals for the Sixth Circuit in Case No. 7112, Andrew Hoyd, Bankrupt, Appellant, v. The Citizens Bank of Albany, Appellee, decided March 12, 1937.

Section 75 of the Bankruptcy Act, Subsections (n) and (o).

A copy of this motion was left with Ralph G. Martin, attorney for the Union Joint Stock Land Bank of Detroit, at his office with a clerk thereof on May 7, 1937, prior to the filing of this motion.

Elmer McClain, Attorney for Carl Byerly.

[Vol. 35] IN UNITED STATES DISTRICT COURT

MOTION THAT CASE BE REFERRED TO CONCILIATION COMMISSIONER—Filed May 7, 1937

1. Now comes the said farmer debtor bankrupt, Carl Byerly, and respectfully moves that the proceedings herein be referred to a conciliation commissioner pursuant to Subsection (s) of Section 75 of the Bankruptcy Act.

2. Said Carl Byerly respectfully moves the court to refer to the conciliation commissioner for proper proceedings pursuant to Subsection (s) of Section 75 of the Bankruptcy Act, his property described in his schedules which accompanied his petition filed herein on November 19, 1934, having particular reference to the real estate referred to and set forth in Schedule B of said petition, which real estate is more particularly described as follows:

(A description of the real estate is printed as a part of the petition at page 2.)

Carl Byerly. By Elmer McClain, His Attorney.

[Duly verified.]

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING MOTION TO REFER TO CONCILIATION COMMISSIONER—Filed May 8, 1937

This day this matter came on to be heard upon the motion of the farmer debtor to refer this case to a conciliation

commissioner and the court being fully advised in the premises finds that said motion is not well taken for the following reasons:

(1) On October 22, 1936, this court entered an order of disclaimer with respect to the property described in the schedules accompanying the petition of this farmer-debtor and, therefore, there is no real estate over which this court has jurisdiction.

(2) The farmer-debtor has failed to comply with Rule 12, Paragraph 3 of the rules of this court to filing a brief statement of the grounds upon which a motion is based, together with citations of authorities.

[fol. 36] It does not appear that a copy of this motion was served upon opposing counsel and the court is advised that no copy was so served.

It is therefore ordered that said motion be and the same is hereby overruled.

To all of which finding and order of the court, the farmer-debtor excepts.

Mell G. Underwood, United States District Judge.

IN UNITED STATES DISTRICT COURT

ENTRY OVERRULING MOTION TO REFER TO CONCILIATION COMMISSIONER—Filed May 27, 1937

This day this matter came on to be heard upon the motion of the farmer-debtor that the cause be referred to a conciliation commissioner, which motion was filed May 7, 1937, and the court being fully advised in the premises finds that said motion is identical with the motion heretofor- filed and overruled on May 8, 1937. Said motion is therefore not well taken and is hereby overruled.

To all of which findings and order of the court, the farmer-debtor excepts.

Mell G. Underwood, United States District Judge.

[fol. 37] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL UNDER SECTION 24 (A) OF THE BANKRUPTCY ACT—Filed May 27, 1937

To the Honorable Mell G. Underwood, Judge of the United States District Court for the Southern District of Ohio:

Your petitioner, the above-named Carl Byerly, does hereby petition for an appeal to the United States Circuit Court of Appeals for the Sixth Circuit because he conceives himself to be aggrieved by the certain orders entered respectively in this court, to wit: the order entered on October 22, 1936, ordering, adjudging and decreeing that all of the right, title and interest of the said Carl Byerly, your petitioner, in and to the real estate described therein was thereby disclaimed in favor of the said Union Joint Stock Land Bank of Detroit, named as appellant herein; the order entered on May 6, 1937, denying his petition for rehearing of the said order entered October 22, 1936, disclaiming the said real estate; the order entered on May 8, 1937, denying his motion, filed on April 17, 1937, to refer to a conciliation commissioner his proceedings pending herein, having particular reference to the said real estate; the order entered on May 27, 1937, denying his motion filed on May 7, 1937, to refer to a conciliation commissioner his proceedings herein, and particularly his said real estate. With this petition your petitioner presents his assignment of errors.

Your petitioner further prays that his appeal may be allowed and that a citation may be granted, directed to the said Union Joint Stock Land Bank of Detroit, commanding it to appear before the United States Circuit Court of Appeals for the Sixth Circuit to do and to receive that which may appertain to justice to be done in the premises and that a transcript of the record, papers, and evidence in said proceedings duly authenticated may be transmitted to the said United States Circuit Court of Appeals for the Sixth Circuit.

Your petitioner further prays that an order be made fixing the amount of security to be given in a bond to be filed herein, conditioned pursuant to law, and says that said Union Joint Stock Land Bank of Detroit is now and ever since about November 1, 1936, has been in possession of said real estate against the will of the petitioner herein under a

temporary restraining order issued against him by the Common Pleas Court of Madison county, Ohio, upon the [fol. 38] application of said Union Joint Stock Land Bank of Detroit.

Carl Byerly. By Elmer McClain, Lima, Ohio, His Counsel.

[Duly verified.]

Appeal allowed and bond fixed in the amount of $250.00 on May 27, 1937.

Mell G. Underwood, Judge of the United States District Court for the Southern District of Ohio.

In United States District Court

Order Allowing Appeal—Filed June 7, 1937

The petition of Carl Byerly filed June 3, 1937, for leave to appeal from an order of the District Court of the United States for the Southern District of Ohio is hereby granted and the appeal is allowed. Citation to be issued returnable thirty days from this date.

Approved for entry:

(Signed) Xen Hicks, Circuit Judge.

[fol. 39] In United States District Court

Assignment of Errors—Filed May 27, 1937.

Carl Byerly, the above-named appellant, in connection with his petition for appeal filed herewith makes and files this assignment of errors, which he avers occurred in the proceedings had in the above-entitled cause and on which he will rely in his appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the final orders and judgments of the United States District Court for the Southern District of Ohio, Eastern Division, at Columbus, entered respectively on October 22, 1936; May 8, 1937; and May 27, 1937.

The District Court erred:

1. In ordering, by its order entered on October 22, 1936, that all of the interest of Carl Byerly, the appellant herein,

be disclaimed in favor of the Union Joint Stock Land Bank of Detroit, the appellee.

2. In finding and holding that the restraining order entered on November 19, 1934, was modified so as to permit said Union Joint Stock Land Bank of Detroit, the appellee, and the sheriff of Madison county, Ohio, to proceed with the sale of said real estate.

3. In finding and holding that the said Union Joint Stock Land Bank of Detroit became the purchaser of said real estate.

4. In finding and holding that following the decision of the United States Supreme Court in Louisville, etc., v. Radford, the said Carl Byerly applied to the said District Court to have his proceedings dismissed.

5. In finding and holding that any valid deed of said real estate was executed and delivered by the sheriff of Madison county, Ohio.

6. In finding and holding that no proceeding relating to said real estate was pending in said District Court on September 10, 1935, when said purported sheriff's sale was confirmed.

7. In finding and holding that said District Court was entirely without jurisdiction over said real estate on September 16, 1935, when said purported sheriff's sale was confirmed.

8. In finding and holding that the reinstatement of the said proceedings in said District Court on September 24, 1935, did not give said District Court further jurisdiction over said real estate.

9. In finding and holding that said cause passed from the jurisdiction of said District Court with the entry of dismissal on August 26, 1935.

10. In finding and holding that a good title was conveyed to the Union Joint Stock Land Bank of Detroit, appellant [fol. 40] herein, by the sheriff of Madison county, Ohio.

11. By its order entered May 6, 1937, overruling and denying the petition for rehearing filed by the petitioner, Carl Byerly, on October 26, 1936.

12. By its order entered on May 8, 1937, overruling the motion of the petitioner, Carl Byerly, filed April 17, 1937, to refer his case to a conciliation commissioner.

13. By finding and holding that by its order entered on October 22, 1936, there was no real estate over which said District Court had jurisdiction.

14. By its order entered on May 27, 1937, overruling the motion of the petitioner, Carl Byerly, filed May 7, 1937, to refer his case to a conciliation commissioner.

Wherefore the said appellant prays that the said orders may be reversed and for such other and further relief as the court may grant.

Elmer McClain, Counsel for Carl Byerly, Appellant.

Bond on appeal for $250.00 approved and filed June 7, 1937, omitted in printing.

[fol. 41] Citation, in usual form, showing service on Ralph G. Martin filed May 27, 1937, omitted in printing.

[fol. 42] In United States District Court

Entry Extending Time etc.—Filed June 30, 1937

It is ordered that a motion of appellant to dispense with printing of record and briefs be and the same is denied.

It is further ordered, on motion of appellant, that the time for filing transcript of record be and the same is extended to September 1, 1937.

Approved for entry:

(Signed) Xen Hicks, Circuit Judge.

[fol. 43] In United States District Court

Pr-ecipe for Transcript of Record—Filed August 13, 1937

To the clerk of said court:

Please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Sixth

Circuit, pursuant to the appeal herein allowed by this court and by said Court of Appeals and include therein the following papers, namely:

1. Petition of farmer-debtor filed pursuant to Section 75, Subsections (a) to (r) together with the schedules therewith.

2. Order approving said petition and the order of reference thereon.

3. Application for restraining order.

4. Order restraining foreclosure proceedings in state court.

5. Order modifying restraining order.

6. Report of conciliation commissioner.

7. Amended petition pursuant to Subsection (s) of Section 75 as enacted June 28, 1934.

8. Order of adjudication and reference thereon.

9. Order of dismissal entered August 26, 1935.

10. Application for reinstatement.

11. Order of reinstatement.

12. Motion of Union Joint Stock Land Bank to dismiss reinstatement.

13. Motion of Union Joint Stock Land Bank for order of disclaimer [omit description of real estate and substitute the following: (The property described is that set forth in Schedule B which accompanied the petition)].

14. Entry finding Subsection (s) enacted August 28, 1935, Constitutional.

15. Opinion of Judge Underwood filed October 14, 1936, on motion for an order of disclaimer.

16. Order of disclaimer, entered October 22, 1936.

17. Petition for rehearing, filed on October 26, 1936, on order of disclaimer.

18. Certified copy of order of Judge Bell of Madison county, Ohio, Common Pleas Court, overruling motion to vacate confirmation of sheriff sale.

19. Opinion of Judge Underwood filed April 4, 1937, on petition for rehearing.

20. Motion of debtor filed April 17, 1937, to refer proceedings to conciliation commissioner. [Omit description of real estate and substitute: (The real estate described is the same as that set forth in Schedule B which accompanied the petition)].

[fol. 44] 21. Opinion of Judge Underwood filed May 1, 1937, on motion to refer to conciliation commissioner.

22. Order entered May 6, 1937, overruling motion to refer proceedings.

23. Motion of debtor filed May 7, 1937, to refer proceedings to conciliation commissioner [Omit description of real estate and substitute: (The real estate described is that set forth in Schedule B which accompanied the petition)].

24. Order entered May 8, 1937, overruling motion to refer proceedings.

25. Order entered May 27, 1937, overruling motion to refer proceedings.

26. Petition for appeal.

27. Order allowing appeal.

28. Assignment of errors.

29. Appeal bond.

30. Citation.

31. This pr-ecipe.

32. Clerk's certificate.

Said transcript to be prepared and filed in the appellate court on or before September 1, 1937.

Elmer McClain, Counsel for Carl Byerly, Appellant.

Acknowledged and approved.

Ralph G. Martin, Counsel for Union Joint-Stock Land Bank of Detroit, Appellee.

STIPULATION CONCERNING CERTIFICATE OF RECORD

It is hereby stipulated and agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the appellate court, as a truthful and complete copy of the original papers used in these proceedings as set forth in the pr-ecipe for transcript, without further comparison by the clerk.

Elmer McClain, Counsel for Appellant. Ralph G. Martin, Counsel for Appellee.

[fols. 45-46] Clerk's certificate omitted in printing.

[fol. 47] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION

(April 13th, 1939—Before: Hicks, Allen and Hamilton, JJ.)

This cause is argued by Elmer McClain for Appellant and by Ralph G. Martin for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered September 18, 1939

Appeal from the District Court of the United States for the Southern District of Ohio

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded for further proceedings consistent with the opinion of this court.

[fol. 48] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed September 18, 1939

Before Hicks, Allen and Hamilton, Circuit Judges

HICKS, Circuit Judge:

Appeal from three orders in the matter of Carl Byerly, Farmer Debtor, Bankrupt, under Sec. 75(s) of the Bankruptcy Act as amended by Act of August 28, 1935 (U. S. C. Title 11, Section 203).

The first order, entered October 22, 1936, adjudged that all right, title and interest of appellant Byerly in certain real estate (his farm) be disclaimed in favor of appellee, Union Joint Stock Land Bank. The second, entered May

8, 1937, denied appellant's motion for a rehearing upon the first; and the third, entered May 27, 1937, denied appellant's motion to refer the proceedings to a conciliation commissioner. The issue is, whether appellant had a property right in the farm when the court entered the order of disclaimer, or whether such right had been previously divested, during the pendency of his farmer debtor petition, by sheriff's foreclosure sale prior to reference to a conciliation commissioner, with confirmation after such reference.

Since 1924 the Bank, or its assignor, had held a mortgage upon the farm. Appellant became delinquent and on October 19, 1933, the Bank brought foreclosure proceedings in a Court of Common Pleas. On April 26, 1934, a decree of foreclosure and an order of sale were entered. The sale was fixed for November 24, 1934.

On November 19 appellant filed his petition under Sec. 75 of the Bankruptcy Act (Title 11 U. S. C. Sec. 203) for a composition or extension of time within which to pay his debts and receive the benefits of the Frazier-Lemke Act [Act of June 28, 1934, 11 U. S. C. Par. 203(s)] and obtained an order restraining the sale. However, on oral application of the Bank, the court, on November 23, modified the restraining order to permit the sheriff to proceed with the sale; but ordered "that any proceedings or acts subsequent to the sale of said premises, particularly confirmation thereof, or the transfer of any title or deed thereunder be and the same are hereby enjoined and stayed until the further order of this court, in accordance wtih the order of November 19, 1934, except as the same is herein modified. * * *"

[fol. 49] On December 14, 1934, the court approved appellant's petition and referred the matter to a conciliation commissioner who held meetings on January 8 and 24 of 1935. The Bank was the only creditor present and at the second meeting rejected an offer of composition made by appellant. Whereupon on February 11 the Commissioner reported that appellant had failed to obtain the acceptance of a majority in number and amount of all creditors whose claims were filed and allowed.

On the same date appellant amended his petition and asked to be adjudged a bankrupt under Sec. 75(s) of the Bankruptcy Act. Adjudication immediately followed and the matter was referred to a referee.

On May 27, 1935, the Supreme Court declared Sec. 75(s) unconstitutional (Louisville Joint Stock Land Bank v. Radford, 293 U. S. 555) and on August 26 thereafter, upon application of appellant, his petition and amended petition were dismissed because Sec. 75(s) had been found by the Supreme Court to be unconstitutional.

On September 10 the Bank, which had been the purchaser at the foreclosure, applied to and obtained from the State court a confirmation of the sale. The sheriff's deed issued and was recorded the next day. Meanwhile, on August 28, 1935, Congress amended Sec. 75(s), subsection (5) thereof, providing that "all cases that have been dismissed by any * * * court because of the Supreme Court decision, holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges, * * *" The constitutional validity of this amendment was upheld in Wright v. Vinton Branch Mountain Trust Bank, 300 U. S. 440.

Pursuant to this amendment, appellant on September 24, 1935, applied for reinstatement, rehearsing the above facts, and alleging that he had petitioned for the dismissal entered August 26, 1935, because the Bank had represented that unless he dismissed the proceedings it would foreclose; that, relying thereon and believing that this was the only way foreclosure could be prevented, he consented to the dismissal; that the Bank, contrary to its representations, proceeded to obtain confirmation of the sale to it, accepting the [fol. 50] delivery of the deed and recording same; and that it was not until he consulted other counsel that he realized he had paved the way for the confirmation of the sale by the order of dismissal. Appellant concluded his application with the prayer that the Bank be restrained, "from in any manner disposing of, deeding, mortgaging, encumbering" (the farm) "or contracting to do so, until further order of this court."

The proceeding was reinstated on September 24, 1935, and on May 8, 1936, the Bank moved for an order of disclaimer, alleging that appellant's application for reinstatement was filed after the confirmation of the foreclosure sale on September 10, and the execution and recordation of the deed on the following date. The court issued the order of disclaimer. It held that when the sale of the farm was confirmed by the Court of Common Pleas no proceeding was pending in the bankruptcy court and that the court was

therefore without jurisdiction over the farm; that the reinstatement did not give the court further jurisdiction over it and that jurisdiction had passed with the entry of dismissal on August 26, 1935.

Appellant contends that he had an interest in the farm at the time his case was reinstated because the court was unauthorized under subsections (n) and (o)(2) and (6) of Sec. 75 to modify its restraining order of June 28, 1934, to permit the sheriff to make the sale for the reason, that the conciliation commissioner had not then conducted a hearing or filed a report. Pertinent portions of these subsections follow:

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property * * * to the exclusive jurisdiction of the court. * * *"

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the [fol. 51] confirmation or other disposition of the composition or extension proposal by the court. * * *

"(2) Proceedings for foreclosure of a mortgage on land; * * *

"(6) Seizure, distress, sale, or other proceedings under an execution or under any * * * mortgage." [11 U. S. C. Sec. 203 (n) and (o)].

We think that the order modifying the original restraining order to permit the sheriff to proceed with the sale was void. It was made prior to the appointment of a conciliation commissioner and of course prior to any hearing and report by him. The sheriff's sale was an essential step in the proceeding for foreclosure, and the court was not only unauthorized to allow it but its allowance was expressly prohibited by subsection (o) of Sec. 75. The order lay without the scope of the court's jurisdiction.

The order to one side, the sale by the sheriff was void because it was likewise prohibited by subsections (2) and (6) of Section (o). See Hoyd v. Citizens Bank of Albany

Co., 89 Fed. (2d) 105 (C. C. A. 6). The facts in that case differ somewhat from those presented here but the sections of the statute there construed, namely, subsections (n); (o)(2) and (6) of Sec. 75 are the same; In the Hoyd case, we said that the application of subsection (o) was "mandatory." In commenting upon the confirmation of the sale subsequently to the vacation of the restraining order, this court in that case said:

"• • • in any event under the mandatory provisions of subsection (o) all proceedings in the foreclosure action, including sale, were stayed after the filing of the debtor's petition, *and were of no* effect." (Italics ours.)

The appellant and his farm were in the exclusive jurisdiction of the bankruptcy court from the filing of his petition on November 19, 1934, [subsection (n) above quoted; Hoyd v. Citizens Bank, supra, p. 107], until the petition and amended petition were dismissed on August 26, 1935.

We think that the Bank's deed was also void. It was based upon the confirmation of the sale not only unauthor-[fol. 52] ized but specifically prohibited [subsection (o)]. Confirmation was essential to the validity of the Bank's title (Hoyd v. Citizens Bank, supra, p. 108) but there can be no valid confirmation of a void sale. In Mitchell v. St. Maxent's Lessee, 71 U. S. 237, 242, the court said:

"Void process confers no right on the officer to sell, and all acts done under it are absolute nullities."

In Shriver's Lessee v. Lynn, 43 U. S. 43, 59, it was said:

"The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court,—nothing on which its judgment could rest."

In Thatcher v. Powell, 19 U. S. 54, 56, it was said:

"That no individual or public officer can sell, and convey a good title to, the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation; • • •"

It is urged that the decree of confirmation, unappealed from, is valid as against collateral attack, but this rule has no application. We are dealing with something more than a mere error in the judgment of the state court. If that were all, the decree of confirmation would be binding. We are confronted with the lack of the court's power to confirm the sale. The power being absent, the confirmation was a nullity and may be declared such, collaterally. Voorhees v. United States Bank, 35 U. S. 298, 316; Thompson v. Tolmie, 27 U. S. 97, 99. The confirmation being void for want of authority to make it, barred nobody, bound nobody and justified no action thereunder. It is elemental that the question of the jurisdiction of the state court, i. e., its power to act, may be inquired into here. Elliott v. Peirsol, 26 U. S. 248; Hickey v. Stewart, 44 U. S. 750, 761.

[fol. 53] We think that appellant has never been divested of his property rights in the farm and that the bankruptcy court had exclusive jurisdiction [subsection (n)] at the time the order of disclaimer was entered. The order is therefore set aside and the case remanded for further proceedings consistent herewith.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 54] Supreme Court of the United States

Order Allowing Certiorari—Filed January 29, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 43,986. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 579. Union Joint Stock Land Bank of Detroit, Petitioner, vs. Carl Byerly. Petition for a writ of certiorari and exhibit thereto. Filed December 9, 1939. Term No. 579, O. T., 1939.

FILE COPY

Office - Supreme Court, U. S.
FILED
DEC 9 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

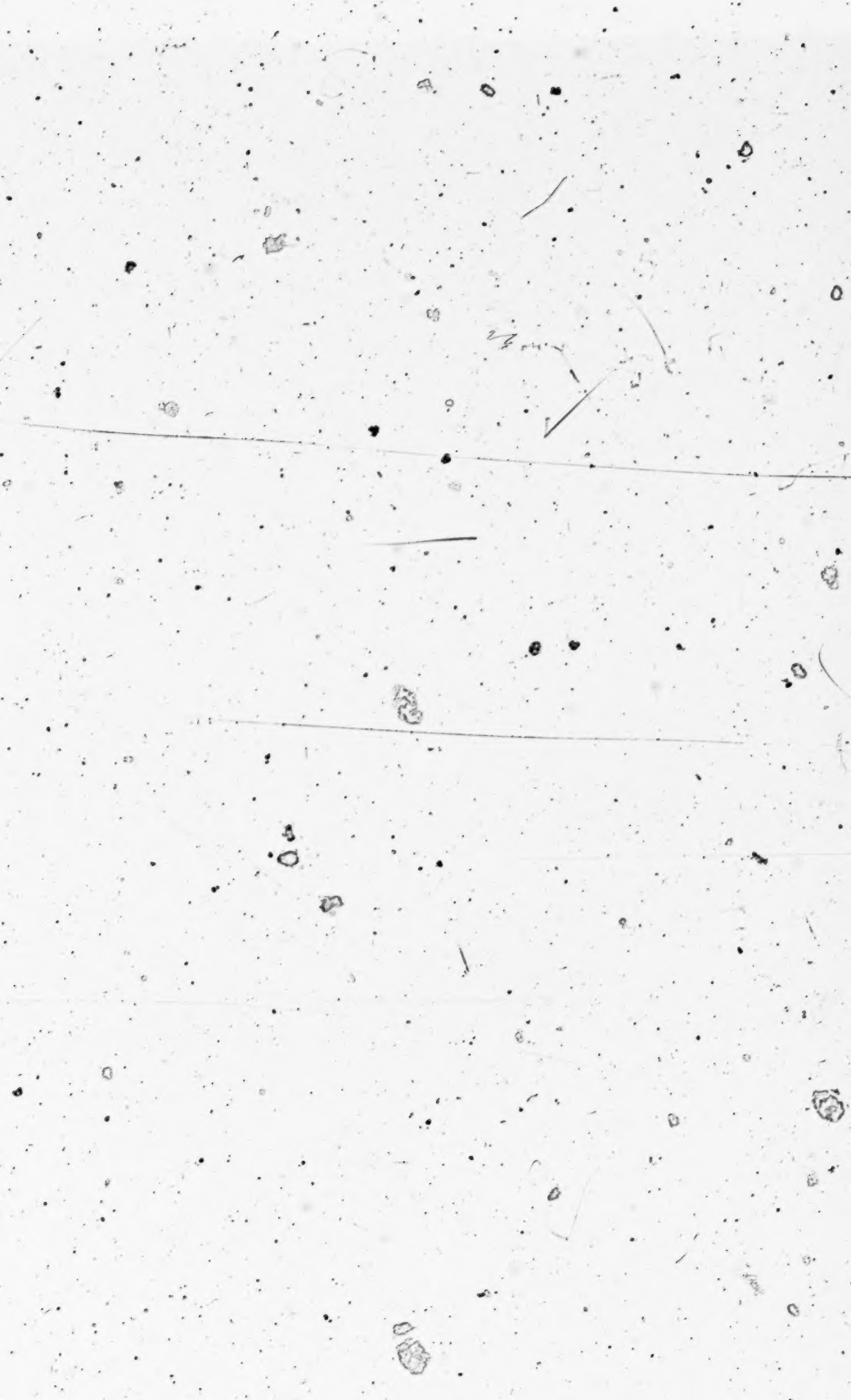
vs.

CARL BYERLY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

A. G. MASTERS,
Detroit, Michigan,
Counsel for Petitioner.

RALPH G MARTIN,
Columbus, Ohio.
Of Counsel.



INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	2
Jurisdiction	4
Questions presented	4
Reasons relied upon for allowance of writ	5
Prayer	7
Brief	9
Opinions below	9
Jurisdiction	10
Statement of the case	10
Rulings of the courts	12
Specification of errors	14
Summary of argument	15
Argument	16
Conclusion	37
Appendix	38
Opinions of Court of Appeals of Madison County, Ohio	38

Table of Cases Cited.

Adair v. *Bank of America Nat'l Trust & Savings Corp.*, 303 U. S. 350	4, 6, 10, 17
Briscoe v. *Rudolph*, 221 U. S. 547	29
First Nat'l Bank & Trust Co. v. *Beach*, 301 U. S. 435	4, 10
Gordon v. *Ware Nat'l Bank*, 132 Fed. 444	34
Grubb v. *Public Utilities Commission of Ohio et al.*, 281 U. S. 470	30
Hall v. *Law*, 102 U. S. 461	29
Harrison v. *Remington Paper Co.*, 140 Fed. 385	24
Hoyd v. *The Citizens Bank of Albany Co.*, 89 F. (2d) 105	36
In re Byerly, 20 Fed. Supp. 762	9
In re 7000 South Shore Drive Bldg. Corp., 86 F. (2d) 499	33

Page

Jack v. *Hood*, 30 F. (2d) 594 34
Litton v. *Pepper*, — U. S. —, No. 39, October Term, 1939, decided December 4, 1939 31
McWilliams v. *Blackard*, 96 F. (2d) 43 6, 20
Minneman v. *Federal Land Bank of Louisville*, 105 F. (2d) 363 6, 21
Mitchell v. *First Nat'l Bank of Chicago*, 180 U. S. 481 31
Montgomery v. *Equitable Life Insurance Co.*, 83 F. (2d) 758 32
Piukkula v. *Pillsbury Astoria Flouring Mills Co.*, 42 P. (2d) 921 24
Prebyl v. *Prudential Insurance Co.*, 98 F. (2d) 199 32
Read v. *Elliott*, 94 F. (2d) 55
Rishol v. *McPherson County*, 34 F. (2d) 250 33
Robertson v. *Howard*, 229 U. S. 254 28
Southern P. R. Co. v. *United States*, 168 U. S. 1 31
Thompson v. *Tolmie*, 2 Pet. 157 29, 35
Viviano v. *Ferguson*, 39 S. W. (2d) 568 24
Wright v. *Schuh*, 134 O. S. 193 34
Wright v. *Union Central Life Insurance Co.*, 304 U. S. 502 6, 18
Wright v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440 19

STATUTES.

Judicial Code, Sec. 240 (28 U. S. C. A. 347a) 10
Bankruptcy Act:
Sec. 75 (11 U. S. C. A. 203) 2, 4, 5, 10, 15
Sec. 75 (a) to (r) (11 U. S. C. A. 203 (a) to (r)), 2, 4, 5, 10, 15
Sec. 75 (e) (11 U. S. C. A. 203 (e)) 4, 5, 10, 15
Sec. 75 (n) (11 U. S. C. A. 203 (n)) 4, 5, 10, 15
Sec. 75 (o) (11 U. S. C. A. 203 (o)) 4, 5, 10, 15
Sec. 75 (s) (11 U. S. C. A. 203 (s)) 4, 5, 10, 15
Sec. 75 (s) as amended August 28, 1935 18, 19
Ohio General Code, Section 11690 15, 25

OTHER AUTHORITY.

24 Ohio Jurisprudence, Sec. 105, page 79 26

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 579

THE UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner and Appellee Below,

vs.

CARL BYERLY.
Respondent and Appellant Below.

No. 7854 IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The Union Joint Stock Land Bank of Detroit respectfully submits its petition for a writ of certiorari to review the judgment of the United States Cir-

cuit Court of Appeals for the Sixth Circuit in the above-entitled case.

The Circuit Court of Appeals for the Sixth Circuit has held a title to real estate in Ohio acquired by petitioners under judicial sale in State Court foreclosure proceedings to be void by its construction of Section 75 (a to r) of the Bankruptcy Act and has reversed the judgment of the District Court for the Southern District of Ohio, Eastern Division, sustaining the motion of the petitioner for an order of disclaimer of all right, title and interest in and to said real estate, consisting of a farm in Madison County, Ohio.

Summary Statement of Matter Involved

This cause concerns the proper construction and effect of Section 75 (a) to (r) of the Bankruptcy Act, 11 U. S. C. A., Sec. 203 (a) to (r), and its application to the facts of the record.

Petitioner was the mortgagee of the real estate involved, and respondent was the mortgagor. Foreclosure was instituted on September 1, 1932. A decree of foreclosure entered in the Common Pleas Court of Madison County, Ohio, and a sale was advertised for November 24, 1934.

On November 19, 1934, respondent filed his petition in the United States District Court under the provisions of Section 75 (a) to (r) of the Bankruptcy Act (R. 1). On the same day the District Court issued an order restraining further proceeding in foreclosure until further order of the court (R. 4).

On November 23, 1934, the District Court entered an order modifying the restraining order of November 19, 1934, to permit the sale of the premises as advertised but restraining any further proceedings, particularly confirmation, sale or transfer of any title or deed thereunder (R. 4).

On November 24, 1934, the Sheriff held the sale as advertised and in accordance with the above order of November 23, 1934.

On December 14, 1934, the petition of respondent was approved as properly filed and an order of reference was made to the Conciliation Commissioner.

On February 1, 1935, respondent abandoned (a) to (r) proceedings and filed his amended petition under Section 75 (s).

On August 26, 1935, the entire proceeding was dismissed by the District Court on application of the respondent, Byerly (R. 8).

On September 10, 1935, sale was confirmed by the Common Pleas Court of Madison County, Ohio (R. 25), which confirmation was thereafter affirmed by the Court of Appeals of said county.

On September 11, 1935, a deed was delivered by the Sheriff to the petitioner and on the same day it was recorded. Thereafter, petitioner went into possession of the premises and still retains possession.

On September 24, 1935, respondent moved the District Court for reinstatement of his case, which was granted (R. 9, 10, 11), but an amended petition has never been filed or an adjudication in bankruptcy entered.

On May 8, 1936, petitioner filed a motion in the District Court seeking an order of disclaimer of the real estate conveyed to it on September 11, 1935 (R. 12).

On October 22, 1936, an Order of Disclaimer was granted by the District Court (R. 18).

On September 18, 1939, Circuit Court of Appeals reversed District Court (R. 47, 48).

The present situation is that petitioner has title and possession of the property under decrees of the courts of Ohio, while the Circuit Court of Appeals has held the sale, confirmation and deed under the proceedings of said State

Courts void under its construction of Section 75 (a) to (r) of the Bankruptcy Act.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under the provisions of Section 347 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347).

The judgment to be reviewed was entered by the Circuit Court of Appeals on September 18, 1939 (R. 47).

This petition was filed on December 9, 1939.

In view of the importance of the question with respect to proceedings instituted under Section 75 of the Bankruptcy Act and the meaning of an Act of Congress being involved, a writ of certiorari should be granted.

Adair v. *Bank of America Nat. Trust and Savings Ass'n*, 303 U. S. 350;

First Nat. Bank & Trust Co. v. *Beach*, 301 U. S. 435.

Questions Presented

I.

After the filing of a petition under Section 75 (a) to (r) of the Bankruptcy Act and after the issuance of a restraining order, restraining the Sheriff from holding an authorized sale in foreclosure until further order of the court, (R. 4), but prior to the approval of the petition and the order of reference by the court (R. 5) could a District Court in November, 1934, in its discretion, amend the restraining order to permit the Sheriff to conduct the sale, restraining, however, confirmation, transfer of title and delivery of deed (R. 4)?

II.

If an order is entered by a District Court amending a restraining order, as set forth in Question I and is acted

upon, not excepted to and not appealed from, is such order *res adjudicata* and binding upon the parties?

III.

Can a Sheriff's sale, held under circumstances stated in Question I, together with a decree of confirmation and deed, be held void by the Bankruptcy Court where the confirmation was entered by the State Court and deed delivered by the Sheriff while the State Court had jurisdiction of the parties and subject matter and after abandonment by debtor of proceedings under Section 75 (a) to (r) by resort to proceedings and adjudication under original Section 75 (s) and after dismissal of the bankruptcy proceedings upon application of the debtor and prior to the reinstatement thereof?

IV.

Can the decrees entered by the courts of the State of Ohio interpreting and applying the statutes of the State of Ohio, entered while such courts had sole and exclusive jurisdiction of the parties and the subject-matter be held void by a bankruptcy court subsequently acquiring jurisdiction of the parties?

V.

Has a Bankruptcy Court the power to hold void, in a collateral attack, the judgment of an Ohio court entered while said court had sole and exclusive jurisdiction of the parties and of the subject-matter, when the right to review said judgment has not been sought by direct attack in the Supreme Court of Ohio and in the Supreme Court of the United States?

Reasons Relied Upon for Allowance of Writ of Certiorari

1. Said Circuit Court of Appeals has decided important questions of Federal law, which have not been, but should be, settled by this Court.

2. Said Circuit Court of Appeals has decided an important question of local law in direct conflict with the decisions of the Court of Common Pleas, and the Court of Appeals of Madison County, Ohio, involving the same parties, subject-matter and issue, and has held the proceedings and decrees of said courts void.

3. Said Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, to-wit:

Adair v. *Bank of America Nat. Trust and Savings Ass'n*, 303 U. S. 350;

Wright v. *Union Central Life Insurance Co.*, 304 U. S. 502.

4. The decision of said Circuit Court of Appeals is probably in conflict with a decision of the United States Circuit Court of Appeals for the Eighth Circuit, to-wit: *McWilliams* v. *Blackard*, 96 Fed. (2d) 43. Also decision of the United States Circuit Court of Appeals for the Seventh Circuit, to-wit: *Minneman* v. *Federal Land Bank of Louisville*, 105 Fed. (2d) 363.

5. Said Circuit Court of Appeals has attempted to void decrees of the Court of Common Pleas and the Court of Appeals of Madison County, Ohio, establishing the title of the petitioner to certain real estate in the State of Ohio, which decrees were entered at a time when said State Courts had sole jurisdiction of the parties and the subject-matter and when no bankruptcy proceeding was pending.

6. The decision of said Circuit Court of Appeals creates a cloud upon the title of petitioner to real estate in Ohio, which title was established by decrees of the Court of Common Pleas and the Court of Appeals of Madison County, Ohio, from which no appeal was taken. Said cloud cannot

be removed by any court other than the Supreme Court of the United States.

WHEREFORE, Your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals, Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the above-entitled cause, being numbered 7854 on its docket, to the end that this cause may be reviewed and determined by this Honorable Court, as provided for by Section 347, Title 28, U. S. C. A.; and that the judgment herein of said Circuit Court of Appeals be reversed by this Honorable Court; and for such further relief as this Court may deem proper.

THE UNION JOINT STOCK LAND BANK OF DETROIT;

A. G. MASTERS,

Counsel for Petitioner;

RALPH G. MARTIN,

Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Opinions Below

The original opinion of the District Court was filed October 14, 1936, and is reported as *In re* Byerly, 20 Fed. Supp., page 762, 33 Am. B. R. (N. S.), 575 (R. 14). The order of the District Court was entered October 22, 1936 (R. 18).

The opinion of the District Court on the petition for rehearing was filed April 16, 1937 (R. 26). The order overruling the petition for rehearing was entered May 6, 1937 (R. 34).

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed September 18, 1939 (R. 48).

Jurisdiction

The jurisdiction of this Court is sought to be invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347a).

The judgment to be reviewed was entered by the Circuit Court of Appeals on September 18, 1939 (R. 47).

This petition was filed on December 9, 1939.

In view of the importance of the question with respect to proceedings instituted under Section 75 of the Bankruptcy Act and the meaning of an Act of Congress being involved, a writ of certiorari should be granted.

Adair v. *Bank of America Nat. Trust and Savings Ass'n*, 303 U. S. 350;

First Nat'l Bank & Trust Co. v. *Beach*, 301 U. S. 435.

Statement of the Case

A summary statement of the matters involved is found in the petition herein. The pertinent facts are as follows:

Carl Byerly, the respondent, was the owner of the farm involved and the Union Joint Lank Bank, petitioner, was the mortgagee. The mortgage was in default on September 1, 1932, and petitioner then filed a foreclosure suit in the Common Pleas Court of Madison County, Ohio. Judgment was rendered with a decree of foreclosure and the property was advertised to be sold by the Sheriff on November 24, 1934. On November 19, 1934, respondent filed his petition in the District Court under Section 75 (a) to (r) of the Bankruptcy Act (R. 1), and a restraining order was issued by the District Court, enjoining the Sheriff from further proceedings (R. 4). Upon application of the petitioner, the

District Court modified the restraining order permitting the Sheriff to proceed with the public sale as advertised, but prohibiting confirmation thereof, delivery of deed or passage of title (R. 4 and 5). The property was offered for sale by the Sheriff and petitioner was the highest bidder but the sale was not confirmed. On December 14, 1934, the petition of respondent was approved and the proceeding was referred to a conciliation commissioner (R. 5), and debtor's offer of composition made and rejected (R. 6). Respondent then filed his amended petition under Section 75 (s) of the Bankruptcy Act (R. [illegible]).

On August 26, 1935, upon application of Carl Byerly, respondent, the District Court dismissed his petition and amended petition, disposing of his proceedings under Section 75 (R. 8 and 9).

On September 11, 1935, the sale was confirmed; the Sheriff executed and delivered a deed to petitioner and the same was recorded. Thereafter, a writ of possession was awarded to petitioner and it was placed in possession of the farm by the Sheriff and it has since retained possession.

Respondent then filed a motion in the Common Pleas Court of Madison County to vacate the decree of confirmation, which motion was overruled. Respondent then perfected an appeal to the Court of Appeals of Madison County, Ohio, and that court affirmed the order of the Common Pleas Court, confirming the sale and overruling the motion to vacate the confirmation. No attempt was made by respondent to carry the case to the Supreme Court of Ohio, or to this Court so that the decrees of the State Courts became final.

On September 24, 1935, respondent filed an application for reinstatement of his bankruptcy proceedings (R. 9, 10 and 11), which was granted (R. 11), but no amended petition has been filed or adjudication in bankruptcy entered.

Petitioner then filed its motion for an order of disclaimer of the premises theretofore conveyed to it (R. 12 and 13) and the District Court granted the same, disclaiming any right, title or interest therein (R. 14 to 32, inclusive, and also R. 34).

On appeal, the Circuit Court of Appeals reversed the District Court, finding that the Sheriff's sale was void, as being in violation of the provisions of Section 75 (o) of the Bankruptcy Act, and that the confirmation of the sale by the Common Pleas Court was also void, without regard to the fact that no proceedings were pending in the Bankruptcy Court at the time of such confirmation and in spite of the ruling of the Court of Appeals of Madison County, Ohio, sustaining the lower court (R. 47 to 53, inclusive).

On October 17, 1939, petitioner filed a petition in said United States Circuit Court of Appeals, Sixth Circuit, for a stay of the execution and enforcement of the judgment of said court for a reasonable time to enable petitioner to apply for, and obtain a writ of certiorari from this Court to said Circuit Court of Appeals. On November 14, 1939, said court granted a stay provided petition for writ of certiorari be filed on or before December 14, 1939.

Rulings of the Courts

The District Court held (R. 17 and 18):

1. That the cause passed from the jurisdiction of the District Court with the entry of dismissal on August 26, 1935 (R. 8); that so far as the proceedings in the District Court were concerned, a good title was conveyed to petitioner during the interval when the District Court had no jurisdiction and that the reinstatement in the District Court, under the circumstances, did not and could not bring the property to which title had passed within its jurisdiction.

2. That the District Court was without jurisdiction of the property involved in view of the confirmation of sale by the State Court and delivery of deed when no proceeding was pending in the District Court and when the State Court had sole and exclusive jurisdiction over the parties and the subject-matter.

3. The title to the property involved had passed to petitioner prior to the reinstatement of the cause under the provisions of Section 75 (s) as amended August 28, 1935. Decree was entered sustaining petitioner's motion for order of disclaimer (R. 18).

The Circuit Court of Appeals reversed the District Court and held (R. 48):

1. That the order of the District Court modifying the original restraining order (R. 4) to permit the Sheriff to proceed with the sale of the real estate involved, was void because beyond the jurisdiction of the District Court.

2. The sale itself was void because prohibited by subsections (2) and (6) of Section (o) of Section 75 of the Bankruptcy Act.

3. That the confirmation of the sale by the State Court was void because the sale was void and that the Sheriff's deed to petitioner, under authority of said confirmation, was also void.

4. That the State Court had no power to confirm the sale and its action could be attacked collaterally in the bankruptcy proceeding.

5. That respondent has never been divested of his property rights and that the Bankruptcy Court had exclusive jurisdiction (subsection n), Section 75, at the time the order of disclaimer was entered.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the District Court was without power to enter its order of November 23, 1934 (R. 4) modifying the restraining order issued November 19, 1934 (R. 4).

2. The Circuit Court of Appeals erred in holding that the provisions of Section 75 (o) of the Bankruptcy Act were mandatory and divested the District Court of the authority or discretion exercised by it in modifying the restraining order (R. 4).

3. Said Circuit Court of Appeals erred in holding that respondent had never been divested of his property rights in the real estate involved and that the Bankruptcy Court had exclusive jurisdiction of said property at the time the order of disclaimer was entered.

4. Said Circuit Court erred in reversing the order of the District Court disclaiming the real estate involved.

5. Said Circuit Court of Appeals erred in holding that the confirmation of sale entered by the Common Pleas Court of Madison County, Ohio, and thereafter affirmed by the Court of Appeals of said county, and the deed from the Sheriff were void and subject to collateral attack herein.

6. Said Circuit Court of Appeals erred in attempting to void the decree of the Court of Common Pleas of Madison County, Ohio, affirmed by the Court of Appeals of said county, which decree was entered by said State Court when it had sole and exclusive jurisdiction of the parties and the subject-matter involved.

Summary of Argument.

I

The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court (R. 4).

II.

The order of the District Court modifying the restraining order and permitting the sale, not excepted to and not appealed from, became res adjudicata and binding upon the respondent.

III.

Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s), followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objecting to such irregularities.

IV.

The so-called sale in the State Court did not change the legal status of the debtor or his property as he still retained the identical right of redemption secured to him by the provision of Ohio G. C. Section 11690 up to the time of confirmation by the State Court, which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings.

V.

The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceedings.

VI.

The case of Hoyd v. The Citizens Bank of Albany Company, 89 F. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48), is clearly distinguishable upon its facts.

Argument.

I.

The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court (R. 4).

The modification of the restraining order so as to permit the sale was within the discretion of the District Court by virtue of the last sentence of Section 75 (e) of the Bankruptcy Act, reading as follows:

> "After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the Court, the Court shall exercise such control over the property of the farmer as the Court deems in the best interests of the farmer and his creditors."

The sale had been advertised by the Sheriff prior to the filing of the petition and the order modifying the restraining order and permitting the sale was entered by the court after the filing of the petition and prior to the confirmation

or other disposition of the composition or extension proposal by the court and to prevent additional costs. It was entered because the court deemed it to the best interests of the farmer and his creditors.

This court has recognized and established the right of the court to exercise judicial discretion in the administration and enforcement of the provisions of Section 75 of the Bankruptcy Act.

In *Adair* v. *Bank of Amer. Nat. Trust & Savings Ass'n.*, 303 U. S. 350, 355, 356 and 357 there was under consideration the interpretation and application of the provisions of Section 75 (e), (n) and (o) of the Bankruptcy Act. On page 355 of the opinion this Court said:

> "To accomplish its purpose, section 75 provides that the filing of a petition shall effect a stay. Such a stay *under judicial discretion* as to enforcement of claims does not take property without due process and is constitutional. * * * In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n) for the exercise by the court of 'such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors.' These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, *in a proper case*, for the continuance of the operations of the farm after the filing of a petition under section 75 of the Bankruptcy Act." (Italics ours.)

Section 75 (n) of the Bankruptcy Act, referred to in the above case and in effect in November, 1934, when the Court modified the restraining order to permit the sale in the instant case, reads as follows:

> "The filing of a petition pleading for relief under this section, shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the

court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

In a case of voluntary bankruptcy, the Court would have the right to modify the restraining order and under the provisions of the foregoing statute, it likewise would have such power.

On the 28th day of August, 1935, Congress amended the above section to remove doubt as to its meaning. The amended section, in part, provides:

"In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute, or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section. * * *"

From the foregoing it would appear that Congress, even in the amended section did not contemplate the restraining of the sale, but merely the extension of the period of redemption or the withholding of a confirmation of sale, for a period necessary for the purpose of carrying out the provisions of the section.

In the case of *Wright* v. *Union Central Life Ins. Co.*, 304 U. S. 502, 515, this Court had under consideration the

interpretation and application of the provisions of Section 75 (n), as amended August 28, 1935, and on page 515 of the opinion states:

> "Section 75 (n), 11 U. S. C. A. Sec. 203 (n) provides that 'the period of redemption shall be extended * * * for the period necessary for the purpose of carrying out the provisions of this section.' *The stay may be approved for the period during which the debtor seeks to effect a composition,* and, as contemplated by section 75 (s), for a moratorium period not exceeding three years, during which the court's equitable supervision over the land continues, and a reasonable rental is required. That such an extension is consonant with the due process clause of the Fifth Amendment is indicated by our decision in Home Bldg. & Loan Ass'n. *v.* Blaisdell, 290 U. S. 398 * * * where we held that neither the due process clause of the Fourteenth Amendment nor the contracts clause were violated by an emergency state statute authorizing extension of the period of redemption from foreclosure sales, for a just and equitable period not exceeding two years, conditioned on payment by the mortgagor of a reasonable rental, *as directed by the court.*" (Italics ours.)

The foregoing quotation certainly means that the stay is not mandatory but *may* be approved for the period during which the debtor seeks to effect the composition. In other words, the court may grant or deny such stay, in its discretion, which denial is subject to review, if proper steps are taken to perfect an appeal, but not otherwise.

In *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, this Court recognized the general equitable jurisdiction of the court in the handling of the property of a debtor under Section 75, even to a dismissal and termination of the proceedings at the outset, although such power is not expressly provided in the Act.

II.

The order of the District Court modifying the restraining order and permitting the sale, not excepted to and not appealed from, became res adjudicata and binding upon the respondent.

The Circuit Court of Appeals has held that the order modifying the restraining order and permitting the sale was void, as not being within the discretion of the District Court. It must be conceded that the District Court had jurisdiction of the parties and subject-matter at the time such order was entered by virtue of the express provisions of the Act. The Respondent did not object to the order and prosecuted no appeal therefrom. It is therefore the contention of the petitioner that the order in question became *res adjudicata* and binding upon the parties upon the expiration of the time for appeal.

In the case of *McWilliams* v. *Blackard*, 96 Fed. (2d) 43, decided by the Circuit Court of Appeals for the Eighth Circuit on April 28, 1938, proceedings under Section 75 had been dismissed on the grounds of the unconstitutionality of Section 75 (s) as amended. No appeal was taken from the order of dismissal and subsequently this Court held that Section 75 (s), as amended, was constitutional. Thereafter, the District Court reinstated the debtor's petition and upon appeal the Circuit Court of Appeals held that the order of dismissal was *res adjudicata* and whether right or wrong, was final and binding upon the parties. The Court, in the course of the opinion makes the following comments:

> "Since no action was taken by the debtor to secure a reversal of the decision of this court, the judgment, whether right or wrong, became final and binding upon him.

"'Whatever may be the nature of a question presented for judicial determination,—whether depending on Federal, general, or local law,—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed. . . .

"This court has held that: 'It is not material to this estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it had jurisdiction of the subject-matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented.'"

Similar facts are involved in the case of *Minneman* v. *Federal Land Bank of Louisville*, 105 Fed. (2d) 363. There, proceedings under Section 75 (s), as amended, had been dismissed because of the alleged unconstitutionality of the section in question. No appeal was taken from the order of dismissal and the time for appeal had passed. Appellants relied upon the amendment of March 4, 1938, Section 75 (s) (5), directing the reinstatement of cases which had been dismissed on the erroneous assumption that sub-section (s) was unconstitutional. The Court, however, stated:

"Here no appeals were taken from the orders admittedly erroneous, nor were applications made to the District Court for their reconsideration in accordance with the holding of the Supreme Court in Wayne United

> Gas Co. *v.* Owens-Illinois Glass Co., 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557. They therefore became final and binding; and the purchasers at the various foreclosure sales became entitled to the issuance of sheriff's deeds upon the expiration of the periods of redemption, the running of which was stayed only so long as the proceedings under section 75 remained pending. When the amendment of March 4, 1938, became effective, there were no proceedings then pending to be reinstated for the reason that the periods of redemption had expired and deeds had issued to the properties vesting title to them in other parties, which titles could not be divested by the subsequent legislation. * * *"

The above cases are both probably in conflict with the decision of the Circuit Court of Appeals in the instant case. In these cases the courts had erroneously dismissed the proceedings. There was nothing in the Act authorizing such dismissals, and it might be said that it was not within the jurisdiction or power of the court to enter such dismissals, in view of the ultimate holding of the Supreme Court that the Act was constitutional, yet the court there had jurisdiction over the parties and the subject-matter by the express terms of the Act and its decrees were binding until modified or reversed. The same is true in the instant case. The District Court had jurisdiction of the parties and the subject-matter by the express terms of the Act and even if the order was erroneously entered, it was binding upon the parties until modified or reversed. No application for modification was ever filed, nor objection made to the order and no appeal taken, so that the order in due course became *res adjudicata*.

III.

Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s), followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objecting to such irregularities.

The order modifying the restraining order to permit the sale was entered by the court during the proceedings under Section 75 (a) to (r) of the Bankruptcy Act. The Circuit Court of Appeals, in its opinion (R. 48), totally ignored the fact that such proceedings had come to naught and that the debtor had thereafter filed his amended petition under original Section 75 (s). It is the contention of petitioner that Respondent thereby abandoned the former proceedings and that any irregularities therein were waived by Respondent and the situation was the same as if such proceedings had never been instituted.

The Circuit Court of Appeals also ignored the fact that the entire proceedings were dismissed by the Court on August 26, 1939, upon application of the debtor and that in the order of dismissal, the Court provided that:

> "* * * this matter be and the same is hereby fully terminated."

If this Court should find that the order modifying the restraining order was not *res adjudicata*, it then must find that all the proceedings under Section 75 of the Bankruptcy Act became nugatory upon the dismissal of the proceedings.

In the case of *Harrison* v. *Remington Paper Co.*, 140 F. 385, 399, 3 L. R. A. (N. S.) 954, the law in this regard is stated as follows:

> "* * * Rulings and decisions in the course of an action which is finally dismissed without prejudice adjudge nothing, because the final judgment by its terms is that nothing has been adjudicated, and this fact is the only *res adjudicata*. Such a judgment determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced."

In *Viviano* v. *Ferguson* (Mo. App.) 39 S. W. (2d) 568, 569, the court said:

> "* * * These suits were voluntarily dismissed by plaintiffs prior to judgment without prejudice; and the dismissal without prejudice inured to the benefit, not only of plaintiffs, but also of defendants as well. In other words, the only adjudication by force of the order of dismissal was that nothing had been adjudged, and therefore the parties were left free to litigate the issues as though the suits had never been filed."

In *Piukkula* v. *Pillsbury Astoria Flouring Mills Co.*, (Oregon Supreme Court) 42 P. (2d) 921, 99 A. L. R. 244, followed by 258, the Court said:

> "* * * In other words, since all of the orders entered in that action, with the exception of the order of dismissal, were rendered nugatory when the action was dismissed, nothing remains which supports the plaintiffs' contention that the defendant waived Piukkula's failure to file his action timely."

Your petitioner therefore maintains that the voluntary dismissal by Respondent of the entire proceedings under Section 75 rendered such proceedings nugatory and that the conditions were then the same as if such proceedings had never been instituted.

IV.

The so-called sale in the State Court did not change the legal status of the debtor or his property as he still retained the identical right of redemption secured to him by the provisions of Ohio G. C. Section 11690 up to the time of confirmation by the State Court, which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings.

A decree of foreclosure had been entered, an order of sale issued and advertising completed before the debtor filed his petition. The only authority granted by the order modifying the restraining order was for the Sheriff to conduct the sale, which amounted to no more than receiving bids, all authority to pass title being expressly withheld. No change was authorized or permitted by the court in the status of the property. At the time of filing his petition, respondent had only one property right and that was the right of redemption, secured to him by the statutes of the State of Ohio, and this right of redemption continued in full force and effect up to the confirmation of the sale.

Ohio General Code Section 11690 provides as follows:

> "In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court to which such execution or order is returnable, the amount of the judgment or judgments or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the date of sale to the time of such deposit; or, if it is made in vacation, to the first day of the next term, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court thereupon shall make an order setting aside such sale, and apply the

deposit to the payment of such judgment or judgments or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase money paid by him, and the interest from the clerk. Nothing in this section shall take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to the enactment hereof (R. S., Section 5398a)."

The foregoing section is construed in 24 Ohio Jur., Section 105, at page 79 as follows:

> "The purchaser obtains no vested right until after the sale is confirmed, and, if the confirmation is refused, the rights of the purchaser fall to the ground. A bid, though the highest, being but an offer to purchase, subject to the approval or disapproval of the court, the accepted bidder whose bid has been returned to the court as the best offer acquires by the mere acceptance of his bid no independent right to have his purchase completed, but is merely a preferred proposer until confirmation of the sale by the court. By acceptance of his bid, and the subsequent confirmation of the same by the court, the bidder becomes the purchaser in the full sense of the term, and the substantial owner of the property sold, with the right of possession, though his right may not be asserted against the former owner until the due execution of a deed."

The modification granted by the court did no more than authorize the Sheriff to accept bids, while at the same time holding the debtor and his property within the jurisdiction of the court and maintaining the *status quo*. No injury or prejudice to the debtor resulted and nothing happened to change the relationship between the debtor and his property until after August 26, 1935, when the debtor, by his own act, removed both himself and his property from the jurisdiction of the court. It was the order of dismissal, not the order of modification which permitted the petitioner to

proceed with its foreclosure. The only property right which respondent had after the decree of foreclosure was the right to redeem and this right of redemption continued until the confirmation of the sale. After the dismissal of the bankruptcy proceedings, the State Court had sole and exclusive jurisdiction of the debtor and his property and its decree of confirmation then entered, cut off this right of redemption.

V.

The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceeding.

The State Court had original and exclusive jurisdiction of the parties and the subject-matter until the filing of the bankruptcy proceedings, at which time, such jurisdiction was superseded by that of the Bankruptcy Court. The judgment and order of foreclosure was entered before the institution of the bankruptcy proceedings so that it was entered while the State Court had exclusive jurisdiction. The judgment of confirmation was entered after the dismissal of the bankruptcy proceedings and when the State Court again had exclusive jurisdiction of the parties and of the subject-matter so that its determination that the foreclosure proceedings had been regular, even though in error, must be considered as *res adjudicata* and binding in any other court, or in any other litigation involving the same parties and the same subject-matter. This is especially true where the interpretation and application of local law is involved, as in the instant case. Here, the statutes of the State of Ohio providing for the foreclosure of mortgages are controlling and it is the primary duty of the State Court to construe and apply such statutes. When it has done so, in a case in which it has jurisdiction of the

parties and the subject-matter, such construction is binding unless directly attacked by appeal in the same proceeding. The omission of any step required by the statutes of Ohio would not and could not avoid a sale if a court in which the proceedings are pending finds that all steps have been taken regularly and its decree remains unmodified or unreversed. In other words, if the property had not been properly advertised, or the Sheriff had not actually held public sale, or, if the property had not been properly appraised, or appraised at all, still the finding of the court that the steps had been properly taken, followed by a confirmation of sale, would be conclusive upon all parties to the suit and the order would become *res adjudicata* upon the lapse of the time given for an appeal. When such order has become *res adjudicata* it cannot be questioned in any other court or in any other proceeding.

The principle stated has been recognized by this Court in *Robertson* v. *Howard*, 229 U. S. 254, 264, 33 S. Ct. 854, 57 L. Ed. 1174, where a referee in bankruptcy had confirmed a trustee's sale. An action was started in the State Court questioning the validity of the sale. The Supreme Court of Kansas held the sale to be void due to irregularities prior to the sale, which included an alleged lack of appraisement and error in the description of the property. This Court, speaking through its Chief Justice White said near the end of the opinion:

> "As regards the alleged lack of an appraisement and error in the description of the property covered by the certificate, contained in the published notice, we think they must in this collateral proceeding be deemed as mere irregularities, and that the order of confirmation, made by the referee, was sufficient to validate the sale under the discretionary power given to the referee by Sec. 70b of the bankruptcy act. Thompson *v.* Tolme, 2 Pet. 157, L. Ed. 381.

"The Supreme Court of Kansas erred in deciding that the plaintiffs in error acquired no right or interest to the land in controversy under the sale made by the Court of Bankruptcy for the Southern District of Illinois; and its judgment must therefore be reversed and the case be remanded for further proceedings not inconsistent with this opinion."

Thompson v. *Tolmie*, 2 Pet. 157, is an early case on this subject. There an independent action in ejectment was brought to recover real estate theretofore sold in partition, in the Circuit Court of the District of Columbia.

This Court, on page 163 held:

"* * * These proceedings were brought before the court below collaterally, and are by no means subject to all the exceptions which might be taken on a direct appeal. They may well be considered judicial proceedings; they were commenced in a court of justice, carried on under the supervising power of the court, and to receive its final ratification. The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court, to set them aside, or in an appellate court. * * *"

Again on page 169:

"When a court has jurisdiction, it has a right to decide every question that occurs in the cause; and whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court."

To the same effect is the case of *Hall* v. *Law*, 102 U. S. 461.

The case of *Briscoe* v. *Rudolph*, 221 U. S. 547 involved the question whether a judgment of the Supreme Court of

the District of Columbia, confirming a special assessment for benefits resulting from a street assessment, could be attacked collaterally because that court upon an objection challenging the assessment as excessive, did not call a second jury as provided for by statute. This Court answered in the negative, holding that this was at most an error which could only be available in appropriate proceedings in error. Near the end of the opinion the court said:

> "* * * But the court was possessed of jurisdiction over the parties and over the subject-matter. If the owner assessed did not in some way take steps to set aside the first verdict, its confirmation would necessarily be final. If he was denied a second jury when entitled to it, the court would fall into error; but the order confirming the assessment would not be void. There is no possible ground for upholding the present collateral attack if the order was avoidable only."

In *Grubb* v. *Public Utilities Commission of Ohio, et al.*, 281 U. S. 470, 50 Sup. Ct. Reporter, 374, the question of estoppel by a judgment arose. There this Court held that the judgment of the State Supreme Court sustaining the Public Utilities Commission in prohibiting operation of a bus line over an interstate bridge was *res adjudicata* in a suit in Federal Court to enjoin enforcement of the Commission's order. A further claim was made that the State Courts did not have jurisdiction to review orders of the Commission relative to interstate commerce. This Court, at page 477 of the opinion stated:

> "* * * The power of the State Court in these particulars are questions of local law only. That court resolved them against the present contentions, for it both reviewed and affirmed the order. * * * Plainly its solution of these questions of local law must be accepted as controlling in this Court, as they were in the District Court. * * *"

In the instant case, the question involved was the validity and legality of proceedings in foreclosure taken under the provisions of the statutes of the State of Ohio. The State Court passed upon these proceedings and held that they were valid. Such decision of the questions of local law must be accepted as controlling in a court subsequently acquiring jurisdiction.

In *Southern Pacific Ry. Co.* v. *United States*, 168 U. S. 1, the court had under consideration the same question and stated:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined, must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them."

The foregoing is quoted and approved in *Mitchell* v. *First National Bank of Chicago*, 180 U. S. 477.

The case of *Pepper* v. *Litton*, decided by this Court December 4, 1939, has been considered by counsel in the preparation of this brief. We believe that the court in that case has adhered to the principles of *res adjudicata* enunciated

in the foregoing decisions, although the ultimate determination of the court turned upon the broad equitable principles not herein involved.

In *Prebyl. v. Prudential Ins. Co. of America*, 98 F. (2d) 199, a situation somewhat similar to the instant case was involved. The plaintiff was a voluntary bankrupt, and an order was entered by the Bankruptcy Court authorizing the defendant-mortgagee to foreclose its mortgage in the State Court, which was done. Mortgagor filed exceptions to the confirmation of sale in the State Court, which were overruled and upon appeal to the Supreme Court of Nebraska, the lower court was sustained. Plaintiff seeks a review in the Federal Court. The court, in its opinion on page 200 says:

> "This exact issue, based upon the identical facts in a suit between the same parties, was directly adjudicated and determined by the Supreme Court of Nebraska adversely to the claim now urged by plaintiff. An issue thus once tried on its merits, culminating in a final judgment, precludes a retrial of the same issue between the same parties, whatever the form of action may be. (Citing cases) * * *".

In *Montgomery v. Equitable Life Assur. Soc. of the United States*, 83 F. (2d) 758 (Seventh Circuit), on page 762 of the opinion the Court said:

> "It is well-settled in Illinois that a decree of a court of general jurisdiction cannot be impeached for fraud or for errors of law where the court had jurisdiction of the parties and the subject matter. * * * In Weberpals *v.* Jenny, supra, the court said, 'Granting that the court had jurisdiction, it is altogether immaterial, when the decree is collaterally called in question, how grossly irregular and manifestly erroneous the proceedings may have been. The decree cannot be regarded as a nullity, and cannot therefore be col-

laterally impeached. Such a decree is binding on the parties, and on every other court, unless reversed or annulled in the direct proceeding. * * * "

In the case of, *In re 7000 South Shore Drive Bldg. Corporation*, 86 F. (2d) 499 (Seventh Circuit), the State Court in a foreclosure proceedings had authorized certain expenditures by the receiver. Subsequently, proceedings were instituted under Section 77 (b) of the Bankruptcy Act. The District Court thereafter disallowed the expenditures and was reversed by the Circuit Court of Appeals, which on pages 501, 502 of its opinion said:

"Here the State court had jurisdiction of the parties and the subject matter. The latter included foreclosure of the trust deed and incidentally the administration of the receivership, in aid of the foreclosure. The custody of and jurisdiction over the res, the real estate and the rents and profits thereof, were lodged in the court. It was its duty, through its receiver, to conserve the res of the estate, to preserve it, and faithfully to administer it, pendente lite, for the benefit of the parties. The order of the State court directing the receiver to make the payment complained may have been erroneous. Whether the terms of the trust deed justified the order, whether other equitable reasons why it should be entered existed, we are not privileged to inquire; the subject matter and the parties being before the court and the issue submitted on proper pleadings, we may not inquire as to the wisdom of the order. * * * "

In *Rishol* v. *McPherson County*, 34 F. (2d) 250, the Court stated on page 252 of the opinion:

"* * * It is settled law that, where a second action involves the same claim or demand, the judgment is conclusive as to all questions that were or might have been determined. * * * "

To the same effect is the case of *Jack* v. *Hood*, 39 F. (2d) 594, in which case the Court on page 595 of the opinion said:

> "Moreover, the decree of the State court, in a controversy between the same parties, or their privies in title, over the same land, is conclusive, not only over matters litigated, but all matters that might have been litigated; * * *"

In *Gordon* v. *Ware National Bank*, 132 Fed. 444, 67 L. R. A. 550, Judge Sanborn of the Eighth Circuit, in speaking of estoppel by a judgment, made the following comment:

> "It is not material to this estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it [illegible] jurisdiction of the subject-matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented. Cromwell *v.* Sac County, 94 U. S. 351, 352, 24 L. ed. 195, 197. * * *"

The rule of law applicable is stated by the Supreme Court of Ohio in the case of *Wright* v. *Schick*, 134 O. S. 193 in the following language:

> " 'Briefly stated, the doctrine of *res judicata* is that an existing final judgment or decree, rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties or their privies, in all other actions or suits in the same or

any other judicial tribunal of concurrent jurisdiction. * * *" 23 Ohio Jurisprudence, 961, Section 730. See also, 34 Corpus Juris, 742, Section 1154.

The Circuit Court of Appeals, in its opinion (R. 52) cites and quotes from several early cases decided by this Court, which it claims support its decision.

Counsel have carefully read the opinions in these cases and with the exception of *Thompson* v. *Tolmie*, 2 Pet. 157, *supra*, all were cases where the court, whose order was sought to be collaterally attacked, had no jurisdiction of the parties or the subject-matter at the time the order in question was entered. These are clearly distinguishable from cases where the court had jurisdiction of both the parties and the subject-matter at the time the order was entered, as in the instant case.

It therefore must be the inevitable conclusion that the State courts had sole and exclusive jurisdiction of the parties and the subject-matter after the voluntary dismissal of the bankruptcy proceeding and that its findings and orders then entered are not now subject to collateral attack in a bankruptcy proceeding thereafter reinstated.

The Respondent had the right to seek review in the Supreme Court of Ohio, and then in this court where the merits of the entire controversy could have been determined in a direct proceeding. Respondent did not see fit to do this, so that the orders of the State courts are now *res adjudicata*.

VI.

The case of Hoyd v. The Citizens Bank of Albany Company, 89 F. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48), is clearly distinguishable upon its facts.

There are several substantial and material differences between the case of *Hoyd* v. *The Citizens Bank of Albany Company*, 89 F. (2d) 105, and the instant case, which render them clearly distinguishable.

These differenses are as follows:

1. In the *Hoyd* case the District Court completely dissolved the restraining order permitting the State court to proceed with the confirmation, which terminated the property right of the farmer debtor, while in the instant case the District Court only modified the restraining order by permitting the sheriff to offer the property for sale, but the order specifically enjoined the confirmation thereby retaining to the debtor his right of redemption.

2. In the *Hoyd* case the debtor prosecuted error on the order dissolving the injunction, while in the instant case the debtor did not prosecute error to the order modifying the injunction.

3. In the *Hoyd* case the order of confirmation was entered by the State court while the bankruptcy proceedings were still pending in the Federal court, while in the instant case the order of confirmation was not entered until after the entire proceedings under Section 75 were dismissed and terminated by the Federal court on application of the debtor himself (R. 8) and at the time of such termination the debtor retained all of his right of redemption.

4. In the *Hoyd* case the right of redemption of the debtor was divested by the State court while the Federal court had sole and exclusive jurisdiction of the debtor and the property. In the instant case the right of redemption of the debtor was divested by the State court while it had sole and exclusive jurisdiction of the debtor and his property, so that when the proceedings were subsequently reinstated under Section 75 (s), as amended August 28, 1935, (R. 13) he had no further property right in the premises of any nature or description.

Conclusion

In the light of the foregoing, we respectfully submit that certiorari should be granted.

Respectfully submitted,

A. G. Masters,
Detroit, Michigan,
Counsel for Petitioner.
Ralph G. Martin,
Columbus, Ohio,
Of Counsel for Petitioner.

APPENDIX

"EXHIBIT A"

IN THE COURT OF APPEALS OF MADISON COUNTY, OHIO

No. 130

UNION JOINT STOCK LAND BANK OF DETROIT, a corporation, Plaintiff-Appellee,

vs.

CARL BYERLY, Defendant-Appellant.

Decision

(Rendered March 4, 1938)

BARNES, *P. J.*

This cause was submitted orally at the October Term, 1937, on a motion to postpone determination pending a decision of the United States District Court of Appeals on what was claimed to be a controlling question. Counsel for appellee vigorously resisted the motion, making the contention that the case pending in the United States District Court was not controlling. Under this situation we announced we would take the case both on the motion and the merits, thinking this plan would expedite the final determination. Leave was taken to file briefs and thereafter the file was to be placed in our hands. The file did not reach us until about ten days ago.

Without further comment we shall overrule the application for postponement. Our reasons will be apparent on the determination of the issues on the merits.

The issuable questions have the appearance of being involved but readily unfold themselves when we understand the nature of the action and the chronological order in which various steps were taken in the State and United States Courts.

On October 19, 1933, plaintiff Stock Land Bank filed its petition against the defendant Byerly praying personal judgment on promissory note for $12,000.00 and interest and foreclosure of mortgage given to secure the note.

Summons was issued and the cause proceeded to judgment, order of sale, appraisement, advertisement and re-

turn of proof of publication on November 16, 1934, the sale to be held November 24, 1934.

On November 19, 1934, the defendant Byerly filed in the United States District Court at Columbus, Ohio, his farmer debtor petition under Section 75 of the Bankruptcy Act. On the same day the United States District Court issued an injunction against the Sheriff of Madison County from proceeding with the sale. On November 23, 1934 the injunctive order of November 19 was modified so as to permit the Sheriff to proceed with his sale on the day mentioned, but enjoining further proceedings, particularly confirmation of sale and transfer of any title or deed thereunder. On the day designated in the advertisement the sheriff offered the premises, and there being no bidders other than the Land Bank, the farm was struck off to them at their bid, which was two-thirds or more of the appraisement.

Other than the Sheriff's return no further proceedings were taken in the State Court for almost one year thereafter. In December, 1934 the farmer debtor's petition was referred to a conciliation commission. Thereafter a creditors' meeting was held and the debtor's offer of composition was rejected. This fact was reported by the commissioner to the Federal Court on February 11, 1935. On the same day the petitioner by leave of court amended his petition under Section *S* and was adjudged a bankrupt. On May 27, 1935, the Supreme Court of the United States in the case of Louisville, etc., *v.* Radford, 256 U. S. 170, held said Section *S* to be unconstitutional.

On August 26, 1935 the farmer debtor's petition in the U. S. District Court was dismissed as per the following entry:

> "This day this matter came on to be heard upon the application of the debtor herein for an order dismissing this proceedings, and it appearing to the court that the debtor heretofore filed his petition under Section 75 of the Bankruptcy Act as amended, praying for composition or extension; that upon said petition reference was duly had to and a meeting of creditors was held before Silas G. Williams, conciliation com-

missioner for Madison County, Ohio, and that debtor's offer of composition or extension was refused by a majority of creditors, both in number and amount, that the said commissioner has filed his return showing such refusal and that thereafter the debtor amended his petition herein and proceeding under sub-Section S of Section 75 of said Bankruptcy Act, and that the said section was found to be unconstitutional by the United States Supreme Court.

"It is therefore ordered that the debtor's petition and amended petition be and the same are hereby dismissed and that this matter be and the same is hereby fully terminated."

On August 28, 1935, through an action of Congress, there became effective a new sub-section S of Section 75 of the Bankruptcy Act. On September 10, 1935, there was presented to the Common Pleas Court application for confirmation of Sheriff's sale, accompanied by evidence of the dismissal of farmer debtor's petition in the United States District Court. The sale was confirmed and deed ordered as evidenced by journalized entry. The deed was filed for record in the Recorder's Office, Madison County on September 11, 1935.

On September 23, 1935 counsel for the farmer debtor filed motion in the United States District Court for reinstatement of cause and on May 21, 1936 the motion was sustained. On September 24, 1935 the defendant Byerly filed motion in the Common Pleas Court of Madison County, Ohio, asking that the sale, confirmation, etc., be set aside. On May 8, 1936 the Land Bank filed in the United States District Court its motion praying disclaimer, which motion was sustained on October 14, 1936.

On November 4, 1936 the defendant Byerly's motion of September 24 was overruled. On November 14, 1936 a motion for new trial in State Court was overruled. The ground of defendant's motion to set aside the sale and confirmation of sale, etc., was predicated on alleged fraud. The Specification of Fraud was based on the claim that the plaintiff Land Bank, through its representative and/or attorneys had induced the dismissal of the defendant's pro-

ceeding in the United States District Court under a promise that confirmation of sale in Common Pleas Court would not be requested, etc. The Common Pleas Court heard the evidence and found against the defendant on its claim of fraudulent conduct.

We have examined the record very carefully and have no difficulty in agreeing with the Trial Court's finding.

Counsel for defendant Byerly raises a further question that the United States District Court exceeded its authority in modifying the order of injunction whereby the Sheriff of Madison County was permitted to hold his public auction sale and make his return of premises sold to the plaintiff. The claim is further made that injunction was not necessary for the reason that Section 75 (n and o) are self-executing and had the effect of staying all proceedings in the State Court the instant the farmer debtor's petition was filed in the United States District Court. In support of this theory of law the following Federal cases are cited: In re Bradford, 7 Fed. 665; In re O'Brien, 9 Fed. 892. However strongly we might be inclined to follow this theory of the law, we are confronted with the fact that we have no jurisdiction to review judgments of the Federal District Court.

A further claim is made that the defendant's motion for reinstatement of his cause having been sustained, such order would vitiate the action of the Common Pleas Court in confirming the sale.

It is our judgment that the action of plaintiff in dismissing his cause in the Federal Court compels us to resolve all questions against him. The Trial Court so found and the opinion of the United States District Court attached to the brief leads to the same conclusion.

The judgment of the Trial Court will be affirmed and cause remanded for further proceedings according to law.

Costs will be adjudged against the appellant.

(Hornbeck and Geiger, *JJ.*, concurring).

Appearances: Ralph G. Martin, Columbus, Ohio, Martin P. Carey, Plain City, Ohio, For Plaintiff-Appellee; Elmer McClain, Lima, Ohio, For Defendant-Appellant.

"EXHIBIT B"

IN THE COURT OF APPEALS OF MADISON COUNTY, OHIO

No. 130

THE UNION JOINT STOCK LAND BANK OF DETROIT, a corporation, Plaintiff-Appellee,

vs.

CARL BYERLY, Defendant-Appellant

Decision

Rendered March 24, 1938

By the Court:

The above-entitled cause is now being determined on appellant's application for rehearing.

The three page memorandum accompanying the application in reality is a criticism of the court's views, rather than new questions, new authorities or omitted issues, which are generally understood to be the office of an application for rehearing.

The complaint that the date is incorrectly stated is of no more substance than an argument that we failed to cross our t's and dot our i's. The fact remains, regardless of the date, that the appellant's dismissal of his action in the United States Court was prior thereto. The matters complained of by counsel are purely historical and in the end our judgment was founded upon plaintiff's dismissal of his cause in the Federal Court.

The application for rehearing will be overruled.

(BARNES, *P. J.*, HORNBECK and GEIGER, *JJ.*, concurring.)

Appearances: RALPH G. MARTIN, Columbus, Ohio, MARTIN P. CAREY, Plain City Ohio, for Plaintiff-Appellee; ELMER MCCLAIN, Lima Ohio, for Defendant-Appellant.

FILE COPY

JAN 23D, 1940

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT

ELMER MCCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent.

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT

ELMER MCCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent.

SUBJECT INDEX

	Page
Corrections	1
The Applicable Statutes	2
The Question Involved	7
The Facts	8
Argument	13
Point I	
The farmer debtor had title to his farm when his proceeding was dismissed because of the holding that the original Section 75 was invalid. R. 8-9. This is true, whether the sheriff's sale was valid or void, because there had been no confirmation of the foreclosure sale.	14
The Mortgagor's Right of Redemption in Ohio	14
Point II	
The sheriff's sale was void because it was conducted while federal court proceedings under Section 75 (a) to (r) were pending.	16
Point III	
The federal court order (R. 4) purporting to authorize the sheriff to conduct the sale while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed	17
Federal Court Decisions on the Point	18
Point IV	
The confirmation by the state court of the sheriff's sale was ineffective because the void sale could not be confirmed.	23
Point V	
The state court did not have jurisdiction when it attempted to confirm the void sale.	28
Point VI	
An act of a court which is performed while it has no power is a nullity and is subject to attack at any time or place.	29
Point VII	
An examination of the points presented in the petitioner's brief.	36
Conclusion	50

TABLE OF CASES

B

Page

Bank of U. S. v. Piatt's Heirs and Administrators, 5 Ohio 540, 541 15
Bassett v. Daniels, 10 O. S. 617 26
Beal v. King, 6 Ohio 11 26
Boswell v. Otis, 50 U. S. (9 How.) 336 43
Briscoe v. Rudolph, 221 U. S. 547 44
Byerly v. Union Joint Stock Land Bank of Detroit, 106 Fed. (2d) 576 ..... 21, 23, 48

C

Childs v. Childs, 10 O. S. 339, 75 Am. Dec. 512 15
Clore, In re, 11 Fed. Supp. 465 22
Commercial Bank and Savings Co. v. Woodville Savings Bank Company, 126 O. S. 587; 186 N. E. 444 ..... 14, 15

E

Elliott v. Peirsoll, 26 U. S. (1 Pet.) 328 ..... 1, 31

G

Gantley v. Ewing, 44 U. S. (3 How.) 707 ..... 33, 43, 44
Gordon v. Ware, 132 Fed. 444 47
Grubb v. Public Utilities, 281 U. S. 470 .....
Grubb v. Public Utilities, 119 O. S. 264 44

H

Hall v. Law, 102 U. S. 461 44
Hardt v. Kirkpatrick, 91 Fed. (2d) 875 22
Harrison v. Remington, 140 Fed. 385 40
Hickey v. Stewart, 44 U. S. (3 How.) 750 ..... 34, 43
Hopkins v. Clyde, 71 O. S. 141, 72 N. E. 846; 104 Am. St. Rep. 737; 1 Ann. Cas. 1000 15
Hoyd v. Citizens Bank, 89 Fed. (2d) 105 ..... 14, 19, 21, 48
Hurst v. Fisher, 64 O. S. 530 27

I

In re Clore, 11 Fed. Supp. 465 22
In re 7000 South Shore, 86 Fed. (2d) 499 47
In re Wogstad, 27 ABR NS 363 19

J

Jack v. Hood, 39 Fed. (2d) 594 47

K

Kalb v. Feuerstein, decided January 2, 1940 ..... 17, 29, 36, 47, 49

TABLE OF CASES

L

Page

Louisville, etc. v. Radford, 295 U. S. 555 ..... 1, 9
Ludlow v. Johnston, 3 Ohio 553, 577 25

M

Martin v. Alter, 42 O. S. 94; 98 15
Minneman v. Federal Land Bank, 105 Fed. (2d) 363 .. 38
Mitchell v. First National Bank, 180 U. S. 477 45
Mitchell v. St. Maxent, 71 U. S. (4 Wall.) 237 ..... 34, 43
Montgomery v. Equitable, 83 Fed. (2d) 758 46
Morgan v. Mason, 20 Ohio 401 26

Mc

McArthur v. Franklin, 16 O. S. 193 ..... 14, 15
McWilliams v. Blackard, 96 Fed. (2d) 43 ..... 37, 38

N

Naylor v. Cantley, 96 Fed. (2d) 761 20

P

Peppe. v. Litton, — U. S. —, 60 S. Ct. 238 45
Piukkula v. Pillsbury, 42 P. (2d). 921 40
Prebyl v. Prudential, 98 Fed. (2d) 199 46

R

Reed v. Radigan, 42 O. S. 292 27
Richland County Mutual Insurance Company v. Sampson, 38 O. S. 672 ..... 14, 15
Rishol v. McPherson, 34 Fed. (2d) 250 47
Robertson v. Howard, 229 U. S. 254 44
Robinson v. Fife, 3 O. S. 551 15

S

7000 South Shore, In re, 86 Fed. (2d) 449 47
Shriver v. Lynn, 43 U. S. (2 How.) 43 ..... 35, 43, 49
Stites v. Wiedner, 35 O. S. 555 26
Southern Pacific v. U. S., 168 U. S. 1 45
Sun Fire Office of London v. Clark, 53 O. S. 414; 42 N. E. 248; 38 LRA 562 ..... 14, 15

T

Taylor v. Fowler, 18 Ohio, 567; 51 Am. Dec. 469 15
Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, 125 .1, 34, 43
Thompson v. Tolmie, 27 U. S. (2 Pet.) 157, 163 ... 1, 32, 44

TABLE OF CASES

V

Page

Viviano v. Ferguson, 39 S. W. (2d) 568 40
Voorhees v. U. S. Bank, 35 U. S. (10 Pet.) 449, 473 ..... 1, 32, 33

W

Wayne v. Owens-Illinois, 300 U. S. 131 29
Wilcons v. Penn. Mutual, 91 Fed. (2d) 417 20
Wogstad, In re, 27 ABR NS 363 19
Wright v. Schick, 134 O. S. 193 47
Wright v. Union Central, 304 U. S. 502 ..... 30, 47
Wright v. Union Central, 7 N. E. (2d) 208 30
Wright v. Union Central, Ind. Sup. 10 N. E. (2d) 726 30
Wright v. Vinton, 300 U. S. 440 38

STATUTES CITED

Bankruptcy Law of 1898 46
Section 67 46
Bankruptcy Act
Section 75 (Act of March 3 1933, 11 U. S. C. 203) 24, 37, 39, 44, 46, 50
Section 75 (Amended) 21
Section 75 (a) to (r) 8, 9, 12, 13, 16, 17, 19, 20, 22, 37, 39, 40
Section 75 (c) 2, 8
Section 75 (n) (original) 2
Section 75 (n) (amended) (Act of August 28, 1935) 2, 11, 16, 17, 20, 27, 36, 40, 49
Section 75 (o) 4, 9, 13, 16, 17, 19, 20, 21, 22, 27, 36, 37, 40, 42, 48, 49
Section 75 (p) (amended), (Act of August 28, 1935) 5, 17, 20, 28, 36, 40, 49
Section 75 (s) (original), (Act of March 3, 1933) 9, 11, 13, 14, 28, 39
Section 75 (s) (amended), (Act of August 28, 1935) 2, 5, 6, 9, 11, 12, 22, 28, 31, 37, 38, 39, 42
Section 77B 47
General Code of Ohio, Section 11690 ..... 6, 14, 41
General Code of Ohio, Section 11681 7

AUTHORITIES

Page

Congressional Record, 74th Congress, 1st Session, pages 15037, 15038. Report of Mrs. Caraway from the Committee on Enrolled Bills 28

42 Corpus Juris, "Mortgages", Section 1864, page 227 25

Freeman on Judicial Sales, Sections 23, 42 23

4 Jones on Mortgages, 8th Ed., Section 2099 (old numbering 1633), page 579 24

17 Ohio Jurisprudence, "Executions", Section 306 23

24 Ohio Jurisprudence, 79 15

24 Ohio Jurisprudence, "Judicial Sales", Section 4 23

27 Ohio Jurisprudence, 727, 728 15

16 Ruling Case Law, "Judicial Sales", Section 3, page 8 24

16 Ruling Case Law, "Judicial Sales", Section 19, page 25 25

Senate Bill 3002 28

Wiltzie on Mortgage Foreclosure, 4th Edition, Section 735 24

Constitution of United States of America

Article I, Section 1 18

Article I, Section 8 18

Article VI 18

Fifth Amendment 37, 43

Fourteenth Amendment 37, 43

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE RESPONDENT

(All emphasis in this brief is supplied unless noted otherwise.)

CORRECTIONS

By some inadvertance errors appear in the paging of citations contained in the opinion of the Circuit Court below as printed in the Record at pages 48 to 53. They are here corrected.

Louisville, etc. v. Radford, R. 49, should read *295* U. S. 555 (instead of "293" U. S.)

Thatcher v. Powell, R. 52, should read 19 U. S. *119, 125* (*instead of* "54, 56.")

Voorhees v. United States Bank, R. 52, should read 35 U. S. *449, 473* (*instead of* "298, 316.")

Thompson v. Tolmie; R. 52, should read 27 U. S. *157, 163* (*instead of* "97, 99.")

Elliott v. Peirsoll, R. 52, should read 26 U. S. *328* (*instead of* "248.")

THE APPLICABLE STATUTES

Section 75 (c) (Act of March 3, 1933 11 U. S. C., Section 203 (c)):

> ". . . a petition may be filed by any farmer stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts . . ."

Section 75 (n) (as originally enacted in the Act of March 3, 1933, 11 U. S. C. Section 203 (n)):

> **"The filing of a petition** pleading for relief under this section **shall subject the farmer and his property,** wherever located, **to the exclusive jurisdiction of the court.** In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

On August 28, 1935, when the present Section 75 (s) was enacted, the above Section 75 (n) was amended to read as follows:

Section 75 (n) (Act of August 28, 1935, 11 U. S. C., Section 203 (n)):

> **"The filing of a petition** or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under

Section 75 of this act, as amended, **shall immediately subject the farmer and all of his property,** wherever located, for all the purposes of this section, **to the exclusive jurisdiction of the court, including** all real or personal property, or **any equity or right in any such property,** including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, **the right or the equity of redemption where the period of redemption has not or had not expired,** or where a deed of trust has been given as security, **or where the sale has not or had not been confirmed,** or **where deed had not been delivered, at the time of filing the petition.**

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute **or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section.** The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary pe-

tition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding the same to the clerk of court."

The following, Section 75 (o), has never been amended:

Section 75 (o) (Act of March 3, 1933, 11 U. S. C., Section 203 (o)):

"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, **shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:**

(1) **Proceedings for any demand, debt, or account,** including any money demand;

(2) **Proceedings for foreclosure of a mortgage on land,** or for cancellation, rescission, or specific performance of an agreement for sale of land **or for recovery of possession of land;**

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) **Proceedings by way of execution,** attachment, or garnishment;

(5) **Proceedings to sell land under or in satisfaction of any judgment** or mechanic's lien; and

(c) Seizure, distress, **sale, or other proceedings** under an execution or **under any lease, lien,** chattel mortgage, conditional sale agreement, crop payment agreement, **or mortgage.**"

Section 75 (p) as amended in the Act of August 28, 1935, 11 U. S. C., Section 203 (p):

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 of this Act."

Section 75 (s) (Act of August 28, 1935, 11 U. S. C., Section 203 (s)):

From the first, unnumbered paragraph of Section 75 (s):

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal; or if he feels aggrieved by the composition and/or extension, **may amend his petition** or answer, **asking to be adjudged a bankrupt.** Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged encumbered, or unencumbered, be appraised, and that his unencumbered exemptions and unencumbered interest or equity in his exemptions as prescribed by state law, be set aside to him, and that he be allowed to retain possession, under the supervision and

control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. . . ."

Paragraph (5) of Section 75 (s):

"(5) **This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Act,** as well as to future cases; **and all cases that have been dismissed by any** conciliation commissioner, referee, or **court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated,** without any additional filing fees or charges. . . ."

General Code of Ohio, Section 11690:

"Judgment Debtor May Redeem Any Time Before Confirmation.

In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court to which such execution or order is returnable, the amount of the judgment or judgments or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit; or, if it is made in vacation, to the first day of the next term, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such judgment or judgments or decree and costs, and award such interest to the purchaser, who shall receive from the officer making the sale the purchase

money paid by him, and the interest from the clerk. Nothing in this section shall take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to the enactment hereof. (R. S. Section 5389a.)"

General Code of Ohio, Section 11681.

"Notice of Time and Place.

Lands and tenements taken in execution shall not be sold until the officer causes public notice to be given of the time and place of sale, for at least thirty days before the day of sale, by advertisement in a newspaper printed and of general circulation in the county. The court ordering sale may, in the order of sale, designate the newspaper in which such notice shall be published. (112 v. 261; R. S. Section 5393. Eff. Aug. 9, 1927.)"

THE QUESTION INVOLVED

There was but one legal question involved in the court below. It may be stated thus:

When the District Court disclaimed the farmer debtor's farm on October 22, 1936 (R. 18); (which was adhered to in its order denying the farmer debtor's motion for rehearing on May 6, 1937, R. 34), did the farmer debtor then have a property right in that farm?

Both parties in the court below, and the court below, all agreed that this was the question.

The respondent's brief on appeal to the Circuit Court below as appellant on page 1 reads as follows:

"The legal issue involved here is whether the appellant was divested of his property right in his farm by the sheriff's sale in foreclosure during the pendency of his farmer debtor petition and before the petition had been referred to a conciliation commissioner."

The petitioner here who was appellee in the Circuit Court below said on page 1 of its brief in that court:

> "The one question to be decided upon this appeal is whether the appellant had a property right in the farm when the District Court disclaimed the farm in its order of disclaimer entered October 22, 1936 (Record, page 18)."

The Circuit Court below said in its unanimous opinion (R. 48, second paragraph, last sentence):

> "The issue is: whether appellant had a property right in the farm when the court entered the order of disclaimer, or whether such right had been previously divested, during the pendency of this farmer debtor petition, by sheriff's foreclosure sale prior to reference to a conciliation commissioner with confirmation after such reference."

THE FACTS

Stated within the smallest possible compass the essential facts are:

1. The respondent as farmer debtor filed his petition in the Federal Court under Section 75 (a) to (r) for composition or extension of his debts during the pendency of a foreclosure suit brought by the petitioner here against him and his farm in the State Court and while the sheriff's advertisement of sale was running. R. 1. R. 2, "Schedule 'A'", second item, "Schedule 'B'", first item, and "Statement". See Section 75 (c) at page 2 of this brief.

2. Upon application of the farmer debtor, the district judge issued a restraining order restraining the sheriff and the mortgage holder from conducting the sale. R. 4, top of page.

3. Four days later upon the oral application of the mortgage holder, the petitioner here, the district judge modified the restraining order without compliance with Section 75 (o), by purporting to authorize the sheriff to hold the foreclosure sale but continuing the restraining order against confirmation by the State Court. R. 4-5. The sheriff sold the farm the next day on November 24, 1934. R. 12, 7th and 8th lines from the bottom of the page.

4. Failing to attain composition or extension of his debts under Section 75 (a) to (r) the farmer debtor filed his amended petition under the original Section 75 (s) and was adjudged a farmer debtor bankrupt on February 11, 1935. R. 7-8. See the first unnumbered paragraph of Section 75 (s) at page 5 of this brief.

5. This court on May 27, 1935, in *Louisville v. Radford*, 295 U. S. 555, held the original Section 75 (s), under which the proceedings were pending, to be invalid.

6. On August 26, 1935 (just two days before the President approved the present Section 75 (s) (on August 28, 1935), the proceeding was dismissed because of said decision. R. 8-9.[1]

---

[1]The following is from the opinion of the court below. (See R. 49, third paragraph.) "On May 27, 1935, the Supreme Court declared Sec. 75 (s) unconstitutional (Louisville v. Radford, 295 [295] U. S. 555); and on August 26 thereafter, upon application of appellant, his petition and amended petition were dismissed because Sec. 75 (s) had been found by the Supreme Court to be unconstitutional."

The farmer debtor asserted, and the mortgage holder, the petitioner here, never denied that, " . . . the said Union Joint Stock Land Bank of Detroit represented to him the said Carl Byerly, while his said case was still so pending in this court that unless he, the said Carl Byerly, would dismiss his proceeding in this court, that is his farmer debtor proceeding in this case Number 10984, it, the Union Joint Land Bank of Detroit, would foreclose his mortgage in said Common Pleas Court case pending in Madison County, Ohio, in which said land bank was the mortgagee plaintiff; that he, the said Carl Byerly, relying upon the said representations of the said land

7. As stated in the foregoing paragraph (6), two days after the dismissal of the farmer debtor proceedings the present Section 75 (n) and the present Section 75 (s) became effective on August 28, 1935. Paragraph (5) of the new Section 75 (s) provided that ". . . all cases that have been dismissed by any conciliation commissioner, referee or court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated, . . ." (set forth in full at page 6 of this brief).

---

bank and believing that the only way by which the foreclosure of the said land bank's mortgage could be prevented was to have said case Number 10984 in this court dismissed, consented that it might be so dismissed, whereupon his attorney of record in this case Number 10984, filed a motion therein and obtained an order dismissing the same; that thereupon the said the Union Joint Stock Land Bank of Detroit, contrary to the statements and representations made to the said Carl Byerly, proceeded to obtain the consummation of the said sheriff sale of said real estate to it, the said the Union Joint Stock Land Bank of Detroit, accepted the delivery of a deed from said sheriff to it and recorded said deed in the office of the recorder of Madison County, Ohio; the first knowledge of the said sale came to this applicant, Carl Byerly, this week, whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court it was the dismissal thereof which allowed said sale to be consummated." R. 9-10, last six lines at bottom of page 9 and remainder of paragraph on page 10.

The opinion of the Circuit Court below, referring to this allegation says: "... appellant on September 24, 1935, applied for reinstatement, rehearsing the above facts, and alleging that he had petitioned for the dismissal entered August 26, 1935 because the Bank had represented that unless he dismissed the proceedings it would foreclose; that, relying thereon and believing that this was the only way foreclosure could be prevented, he consented to the dismissal; that the Bank, contrary to its representations, proceeded to obtain confirmation of the sale to it, accepting the delivery of the deed and recording same; and that it was not until he consulted other counsel that he realized he had paved the way for the confirmation of the sale by the order of dismissal." R. 49-50, last paragraph on page 49 and first four lines on page 50.

In a brief on behalf of the appellant-respondent which was filed in the Circuit Court below on September 16, 1939, the following statement appeared in Note 1 on page 25. The appellee-petitioner filed its brief thereafter on June 9, 1939, without denying or making any reference to said note. The note was as follows: "The statement at R. 10 which was drafted by Mr. Byerly's present counsel (Elmer

8. Twelve days after the new Section 75 (s) became effective, the mortgage holder, the petitioner here, applied to the State Court and secured a purported confirmation of the sheriff's sale which had been conducted during the pendency of the farmer debtor proceedings under Section 75 (a) to (r)\ R. 12, last paragraph.

9. Upon learning that his farm had been sold in foreclosure the farmer debtor applied for reinstatement of his case in the Federal Court pursuant to the new Section 75 (s), and it was reinstated on September 24, 1935. Application for reinstatement, R. 9-10. Statement of the farmer debtor that he had just learned of the sale

---

McClain) to the effect that his former attorney (Mr. Troxel) **had filed a motion to dismiss is incorrect.** For this error counsel has no excuse but may offer the following explanation: My first knowledge of the case was obtained when Mr. Byerly came to my office in Lima at 9:30 **Saturday** morning, September 21, 1935. After hearing his story we drove 90 miles to Columbus, arriving a short time before the clerk's office closed at noon. A cursory examination of the file disclosed the order of dismissal (R. 8) which stated that "this matter come on to be heard upon the application of the debtor." From this statement and Mr. Byerly's statement that after the Land Bank threatened to foreclose at once unless he authorized his attorney (Mr. Troxel) to approve an entry of dismissal, he had consented thereto, I concluded that an application for dismissal had actually been filed by the farmer debtor. The "Application for Reinstatement" was prepared in Columbus Saturday afternoon and presented to Judge Hough, who on the same afternoon of Saturday, September 21, 1935, drafted with his own hand the Order of Reinstatement at R. 11, which was entered on September 24. It was not until much later that I learned, after a search for it and for a docket entry on it, that no motion for dismissal had ever been filed by Mr. Byerly.

When there was opportunity to talk to Mr. Troxel, former counsel for Mr. Byerly, after the application for reinstatement had been prepared, presented and allowed (R. 9, and 11), I learned more facts about the order of reinstatement. There had been an agreement between Mr. Troxel and counsel for the Land Bank that if Mr. Troxel should approve the order of dismissal the Land Bank would not seek a confirmation of the sheriff's sale. (R. 20, at 22, paragraph 4.)

Contrary to the promise made to Mr. Byerly and contrary to the agreement with Mr. Troxel, his counsel, the Land Bank obtained a confirmation of the sheriff's sale and took a deed to itself soon after the order of dismissal was entered and after the new subsection (s) requiring prompt reinstatement of all dismissed cases had been enacted."

of his farm, R. 10, last seven lines at end of the paragraph continued over from R. 9.[2] Order of Reinstatement, R. 11.

10. The mortgage holder filed its "Motion to Dismiss the Application for Reinstatement" on November 14, 1935. R. 11. It filed its motion to disclaim the farm from the farmer debtor proceedings on May 8, 1936. R. 12.

11. The District Court's order of disclaimer was entered October 22, 1936, R. 18, which it reaffirmed on Petition for Rehearing on May 6, 1937. R. 34. Motions by the farmer debtor to refer his case to a conciliation commissioner under the new Section 75 (s) were denied. R. 33, 34, 34a, 35 and 36.

---

[2] ". . . the first knowledge of the said sale came to this applicant, Carl Byerly, this week, whereupon he consulted other counsel and for the first time learned that instead of it being necessary to dismiss said case in this court Number 10984 in order to prevent the sale of his real estate in said Common Pleas Court, it was the dismissal thereof which allowed said sale to be consummated."

ARGUMENT

We desire to present our argument in a continuous form and then as our final Point VII to examine the points raised in the brief of the petitioner.

POINT I

The farmer debtor had title to his farm when his proceeding was dismissed because of the holding that the original Section 75 (s) was invalid. R. 8-9. This is true whether the sheriff's sale was valid or void because there had been no confirmation of the foreclosure sale.

POINT II

The sheriff's sale was void because it was conducted while Federal Court proceedings under Section 75 (a) to (r) were pending.

POINT III

The Federal Court order (R. 4) purporting to authorize the sheriff to conduct the sale while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed.

POINT IV

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed.

POINT V

The State Court did not have jurisdiction when it attempted to confirm the void sale.

POINT VI

An act of a court which is performed while it has no power is a nullity and is subject to attack at any time or place.

POINT VII

An examination of the points presented in the petitioner's brief.

POINT I

The farmer debtor had title to his farm when his proceeding was dismissed because of the holding that the original Section 75 (s) was invalid. R. 8-9. This is true whether the sheriff's sale was valid or void because there had been no confirmation of foreclosure sale.

The Mortgagor's Right of Redemption in Ohio.

In Ohio, by General Code, Section 11690 (printed in full at page 6 of this brief), a mortgagor retains the fee simple title to his mortgaged land, and he has an equity of redemption from foreclosure until confirmation of the sheriff's sale.

In its unanimous decision the Circuit Court of Appeals for the Sixth Circuit, which has jurisdiction over Ohio, in *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105, (at page 107, beginning at the foot of the second column and continuing in the first column on page 108), found that:

> **"The Ohio courts have repeatedly recognized that the equity of redemption includes both the right to redeem and the substantial estate of the mortgagor.** They hold that this estate exists not only from the execution of the mortgage until condition broken, but also between the time of condition broken and of sale. *McArthur v. Franklin*, 16 Ohio St. 193; *Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Commercial Bank and Savings Company v. Woodville Savings Bank Co.*, 126 Ohio St. 587, 186 N. E. 444.
>
> **As sale in Ohio is not complete until valid confirmation** (Section 11690, General Code; *Richland County Mutual Insurance Co. v. Sampson*, 38 Ohio

St. 672), **appellant at the time he filed his petition had an equity of redemption consisting of an estate and not of a mere right to redeem. Under Ohio law this constitutes property.**

The equity of redemption in Ohio is a substantial estate subject to dower (*Taylor v. Fowler*, 18 Ohio 567, 51 Am. Dec. 469; *McArthur v. Franklin*, supra); to conveyance and judicial sale (*Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Hopkins v. Clyde*, 71 Ohio St. 141, 72 N. E. 846, 104 Am. St. Rep. 737, 1 Ann. Cas. 1000), and descendible to the heirs upon the death of the mortgagor (*Bank of United States v. Piatt's Heirs and Adm'rs*, 5 Ohio 540, 541; *Robinson v. Fife*, 3 Ohio St. 551; *Martin v. Alter*, 42 Ohio St. 94, 98). It constitutes a real and beneficial estate descendible by inheritance and only alienable by deed (*McArthur v. Franklin*, supra), and is an insurable interest in land (*Richland County Mutual Insurance Co. v. Sampson*, supra; *Sun Fire Office of London v. Clark*, supra). **If the confirmation of sale is unauthorized or is refused the purchaser at judicial sale obtains no vested right** (24 Ohio Jurisprudence, 79; 27 Ohio Jurisprudence, 727, 728; *Richland County Mut. Insurance Co. v. Sampson*, supra). The latest expression of the Ohio Supreme Court as to the equity of redemption is found in *Commercial Bank and Savings Co. v. Woodville Savings Bank Co.*, supra, which holds that 'The right to rents and profits of real estate follows the legal title. Consequently a mortgagor in possession is entitled to the rents and profits of the real estate, as an incident of possession of the equity of redemption, and they may be collected by such mortgagor until his equity of redemption expires.'

We conclude that as the sale had not been confirmed at the time of filing the petition, appellant's equity of redemption had not been barred, and that it constituted 'property' which was subject to the jurisdiction of the Federal Court under subsection (n). The foreclosure proceedings and the proceedings for sale thereunder were therefore stayed by the operation of subsection (o)."

Consequently it is established that the farmer debtor in this case was in no degree divested of his real estate by the sheriff's foreclosure sale in the State Court even if the sheriff had authority to sell during the pendency of his farmer debtor proceedings in the Federal Court under subsections (a) to (r). **But the sheriff had no power to sell on November 24, 1939, when he attempted to sell the farm in foreclosure.**

POINT II

The sheriff's sale was void because it was conducted while Federal Court proceedings under Section 75 (a) to (r) were pending.

The attempted sale by the sheriff, which was held when proceedings under Section 75 (a) to (r) for composition or extension were pending was void because it was prohibited by Section 75 (n) and (o). Section 75 (n), which is set out in full at page 2 of this brief, reposes exclusive jurisdiction in the bankruptcy court by the general provision that "The filing of a petition . . . under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court."

Section 75 (o), which is also set out in full at page 4 of this brief, specifically prohibited any foreclosure sale

being held. It reads: "**Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property** at any time after the filing of the petition under this section and prior to the confirmation or other disposition of the composition or extension proposal by the court:" Then follows the designation of foreclosure and other forms of actions which are prohibited.

This Court in its recent decision in *Kalb v. Feuerstein*, which was announced on January 2, 1940, determined that Section 75 (o) is self-executing and mandatory. In the printed decision issued by this Court it is said on page 7, at the end of the unfinished paragraph at the top of the page: "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved after filing a petition for composition and extension . . . of the necessity of litigation elsewhere and its consequent expense. This was accomplished by **granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.**"

POINT III

The Federal Court order (R. 4) purporting to authorize the sheriff to conduct the sale while proceeding under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75(o) was not observed.

The Congress by statute, Section 75 (n), (o), and (p), having withdrawn all power from the State Court, such **power could be restored only by the Congress which withdrew it.** It did so in Section 75 (o) by making clear,

and exclusive, provision for the restoration of power to the State Court. This provision is that such power may not be restored **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."**

Any method of restoring power to the State Court, which might be attempted, other than that prescribed by the Congress, would be judicial legislation which is prohibited by the Constitution in Article I, Section I, providing that "All legislative powers herein granted shall be vested in a Congress of the United States, . . ." Section 8 of the same Article I provides that "The Congress shall have Power . . . to establish . . . uniform Laws on the subject of bankruptcies throughout the United States; . . ." And in Article VI it states that "This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . ." And further that ". . . all judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . ."

The District Court's "ORDER MODIFYING RESTRAINING ORDER ISSUED NOVEMBER 19, 1934" (R. 4) was therefore clearly void and ineffective to restore any modicum of power to the State Court.

Federal Court Decisions on the Point.

All Federal Courts which have had to decide whether a federal judge may restore power to a State Court without following the statutory procedure of reference to a conciliation commissioner, hearing by the conciliation commissioner, and report thereon to the judge, have uni-

formly held that he can not do so. It is difficult to understand how it could be otherwise since any other interpretation would defeat the purpose of the law to give the farmer-debtor an opportunity to rehabilitate himself.

Here are presented the decisions of all reported federal cases upon the subject.

1. *In re Wogstad*, 27 ABR NS 363. February 8, 1935, District Court of Wyoming, Judge Kennedy:

"Undoubtedly a bankruptcy court has the jurisdiction and the right to allow a creditor to proceed under the first clause of paragraph (o) but **this would seem to be limited to a petition made to and granted by the judge after hearing and report by the conciliation commissioner.**"

2. *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105. March 12, 1937. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Simons, and Allen, Circuit Judges. Opinion by Judge Allen.

After sale in foreclosure and just before it was to be confirmed the farmer debtor filed his petition under Section 75 (a) to (r). The district judge restrained confirmation of the foreclosure sale but later vacated the injunction upon motion by the mortgagee. The court said: "No hearing has been held before the commissioner, and no report has been made by him to the court. Hence the prerequisites for securing leave of court to proceed with the sale are lacking. Subsection (o) squarely applies and is mandatory" . . . **"The prerequisite to proper dissolution of the restraining order was that a petition shall be made to and granted by the judge after hearing and report by the conciliation commissioner.** Ap-

pellee could have insisted upon a report from the conciliation commissioner; but it took no such action."

3. *Wilcons v. Penn Mutual*, 91 Fed. (2d) 417. July 6, 1937. Circuit Court of Appeals for the Tenth Circuit, before Lewis, Phillips and Bratton, Circuit Judges. Opinion by Judge Lewis.

Foreclosure had proceeded to sale, confirmation and certificates of purchase to the purchasers. The farmer remained in possession but the mortgagees claimed the farmer had no interest in the land. The court held "But if there was good and sufficient reason why the land could not be administered in the bankruptcy court, either because it did not belong to Wilcons or belonged to another at the time the petition was filed, or because Wilcons' interest and right thereto had terminated, then **subsection (o) of Section 75 provides a remedy to the true owner.**" . . . "Whether appellees' names are in or out of the bankruptcy files and proceedings has no effect on the jurisdiction of the bankruptcy court conferred by **subsection (n) which coupled with subsections (o) and (p) operate as an injunction against everyone unless and until lifted in the way provided by subsection (o).**"

4. *Naylor v. Cantley*, 96 Fed. (2d) 761. May 16, 1938. Circuit Court of Appeals for the Eighth Circuit, before Gardner, Sanborn and Thomas, Circuit Judges. Opinion by Judge Sanborn.

In this case two matters were simultaneously pending in the same United States District Court. While a foreclosure suit was pending against a farmer debtor he filed in the same court his petition under Section 75 (a) to (r). Thereafter the foreclosure sale was conducted

by the District Court and confirmed. The mortgagee contended that "since the bankruptcy proceedings and the foreclosure suit were both pending in the United States District Court for the Eastern District of Arkansas, and that since the same judge had both matters in charge, the orders made and the things done by the court sitting as a court of equity are to be regarded as though made or sanctioned by the court of bankruptcy." The court held that "Since under the provisions of Section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since that court could not surrender its jurisdiction to any other court, **it was incumbent upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75** of the bankruptcy Act." The court remanded the proceedings to the District Court to **vacate the foreclosure sale and pay all rents to the conciliation commissioner and to proceed under Section 75.**

5. *Byerly v. Union Joint Stock Land Bank of Detroit*, 106 Fed. (2d) 576. September 18, 1939. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Allen and Hamilton, Circuit Judges. Opinion by Judge Hicks.

This is the instant case now before this court on petition for certiorari. As in the *Hoyd v. Citizens Bank*, (number 2 in this group of cases), the District Court, without following the mandatory provisions of subsection (o), which require reference to the conciliation commissioner and a hearing and report by him, assumed to authorize the foreclosure proceedings to be conducted

while proceedings under Section 75 (a) to (r) were pending.

Upon these facts the court said: "We think that the order modifying the original restraining order to permit the sheriff to proceed with the sale was void. It was made prior to the appointment of a conciliation commissioner and of course prior to any hearing and report by him. The sheriff's sale was an essential step in the proceeding for foreclosure, and the **court was not only unauthorized to allow it but its allowance was expressly prohibited by subsection (o) of Section 75. The order lay without the scope of the court's jurisdiction.**"

There have been a few reported decisions which are sometimes cited as authority not in accord with the decisions just referred to. However, upon examination of the texts of these decisions, it will be found that they may not be so cited. For example: In *Hardt v. Kirkpatrick*, 91 Fed. (2d) 875, CCA 9, the case had passed out of Section 75 (a) to (r) for composition or extension into Section 75 (s) for the three-year moratorium and the court held that Section 75 (o) (printed in full at page 4 of this brief) by its express terms applies only to the period prior to the disposition of the farmer debtor's proposal under Section 75 (a) to (r). Likewise in the case of *In re Clore*, 11 Fed. Supp. 465, decided by the District Court for the Western Division of Kentucky, all proceedings under Section 75 (a) to (r) had been completed and the State Court did not proceed during the pendency under Section 75 (a) to (r). Judge Hamilton, who rendered this Clore decision, was also one of the three Circuit Court of Appeal Judges who heard the

instant case of *Byerly v. Union Joint Stock Land Bank of Detroit*, now before this court on petition for certiorari which held that subsection (o) is mandatory and self-executing.

POINT IV

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed.

As the State Court was **without power** when the sheriff's sale was conducted such sale was void. The sale being a nullity, no subsequent confirmation could endow it with validity. Some of the authority for these statements follows:

17 Ohio Jurisprudence, "Executions", Section 306: "the sale by the officer under the writ of execution is essential to the title acquired by a person under execution proceedings." (In Ohio foreclosure sales are held "as upon execution".)

24 Ohio Jurisprudence, "Judicial Sales", Section 4: "An order, judgment or decree of sale by a court without jurisdiction is void and not merely voidable. As a logical consequence the sale based thereon is likewise an absolute **nullity.** The rule is equally applicable whether the lack of jurisdiction has reference to the subject matter or to the person. So a void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it are void. Hence a sale based on such judgment has no foundation in law; it must fall. Judicial proceedings are void when the court wherein they take place is acting without jurisdiction."

Freeman on Judicial Sales, Sections 23, 42: "A void judgment, order or decree, in whatever tri-

bunal it may be entered, is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it, are void. Hence a sale based on such judgment has no foundation in law; **it must certainly fall."**

Upon the filing of Mr. Byerly's petition under Section 75 **the jurisdiction of the Common Pleas Court was from then on as nonexistent as if its decree of sale had been issued when it had no jurisdiction.** Whether a sheriff's sale be void for lack of an order of sale to support it, or by express prohibition of the supreme law of the land under the bankruptcy power, in either event, **the sheriff is without power to act, and his act is a mere nullity.** Therefore, the sale conducted by the sheriff while his court had no jurisdiction "must certainly fall" —no right could accrue from it. Confirmation of the **"nullity"** can not cause it to convey title. Restoration of jurisdiction to his court after he had presumed to conduct a void sale could not impart validity to his void act.

4 Jones on Mortgages, Eighth Edition, Section 2099, (old numbering 1633), page 579:

"A sale under a foreclosure decree is void if conducted in a manner which would not have been in the power of the court to authorize."

Wiltzie on Mortgages — Foreclosure, Fourth Edition, Section 735: "But **confirmation will not make good a defect arising from a want of jurisdiction in the court, . . .**"

16 Ruling Case Law, "Judicial Sales", Section 3, Page 8: "And it is even beyond the power of the legislature to validate by retroactive legislation a judicial sale of real estate which was void for want of jurisdiction in the court to make it, at least without making provision for compensation to the owner of the property."

16 Ruling Case Law, "Judicial Sales", Section 19, Page 25: "A **sale made by an officer acting without such authority must be treated as a nullity, even though it be subsequently ratified by the court.** Purchasers at a judgment sale are protected when the power to make the sale is expressly given, not otherwise." "Furthermore, **an original lack of authority cannot be supplied at a later stage in the proceedings in such a manner as to validate the sale by relation.** Thus a sale by a trustee, not authorized to sell under a decree though reported to the court and ratified and confirmed by it after public notice, must be treated as a nullity. In such a case ratification does not bring the sale within the rule which applies where the court has jurisdiction but has committed an error in its proceedings. **The sale being without authority, ratification of it by the court** must be considered as given inadvertently; or if given deliberately and on a full examination of all the facts, still it **must be regarded as unauthorized and void.**"

42 Corpus Juris, "Mortgages", Section 1864, Page 227: **"Confirmation cures all defects and irregularities excepting those which would make the sale absolutely void, such as want of jurisdiction."**

The Supreme Court of Ohio has always supported the doctrine of the texts which have just been quoted. Some instances follow:

Ludlow v. Johnston, 3 Ohio 553, 577, (1828). An action of ejectment was defended by showing a sale conducted when the court had no jurisdiction. The court said: **"When jurisdiction over any particular subject is withdrawn from a court, the effect is the same as to that subject, as if the court**

itself was abolished." "Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry correct any mistake or error which may have been committed while they possessed the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subject."

Beal v. King, 6 Ohio 11 (1833). After judgment was rendered a writ of execution and levy was issued which was invalid. Subsequently a valid order of sale was issued and upon it sale was made and confirmed. In an independent case the court held the sale to be void. The opinion at page 13 says, "The valid *vendi* does not supply the defect of the original *fi fa et lev. fa.* The predicate of the *vendi* is a previous valid writ of *fi fa et lev. fa* and a valid levy upon it."

Morgan v. Mason, 20 Ohio 401, at 408 (1851). The issue was whether plaintiffs obtained title in a former case through a deed delivered by a sheriff after levy, and sale, **which had been confirmed by the court.** The court said: "Without a judgment, levy, and sale, the sheriff possesses no more power or authority to convey the lands of a debtor, than any private person; and consequently without those indispensable requisites, can give no better title to them.

Bassett v. Daniels, 10 O. S. 617, 619 (1858). Judge Swan said that the purchaser takes no title and there is no authority to make a deed until it is "judicially determined that the sale has been legally made."

Stites v. Wiedner, 35 O. S. 555 (1880). The court confirmed a sale in foreclosure of a certain "lot two" which had been decreed to be sold but was omitted from the sheriff's appraisement and a

deed was delivered to the purchaser. In a subsequent action brought by the mortgagor, his title was cleared thus holding the **sale of "lot two" to have been void although it had been confirmed.**

Reed v. Radigan, 42 O. S. 292 (1884). Before there was any statutory right to redeem the sheriff sold lands in foreclosure, all proceedings being regular. A statute provided that if the sale was made in conformity to the statute, the clerk "shall be directed" by the court to make an entry that the sheriff made a deed. After sale was completed the debtor paid the debt. The Court held that notwithstanding the regularity of the proceedings and the mandatory provisions requiring confirmation, the confirmation should be set aside. **The payment of the judgment deprived the court of all power to confirm the sale.**

Hurst v. Fisher, 64 O. S. 530 (1901). **After confirmation of sale, delivery of deed and distribution of the purchase price,** the owner brought an independent action to set the sale aside, on the ground that purchase by an appraiser was void. The sale was set aside. Here there was a valid order of sale but, as in the Byerly case, **the sale was void for a reason extraneous to the physical conduct of the sale.** In the Hurst case it was the purchase by the appraiser; in the Byerly case it was the supreme law of the land expressed in subsections (n) and (o), which **deprived the sheriff of power.**

It seems to be clearly demonstrated that the sale in foreclosure proceedings is a separate and essential function of the court and not merely an incident which may be disregarded. **Foreclosure can not be completed without a sale.** This sale by the sheriff was a nullity and its confirmation could not give it force.

POINT V

But the State Court did not have jurisdiction when it attempted to confirm the void sale.

On August 24, 1935, the present Section 75 (s), being a part of Senate Bill 3002, was presented to the President for signature. See Congressional Record, 74th Congress, 1st Session, Pages 15037-15038. Report of Mrs. Caraway from the Committee on Enrolled Bills.

On August 26, 1935, two days later, Mr. Byerly's proceedings were dismissed because the original subsection (s) had been held invalid. R. 8.

On August 28, 1935, the President approved Senate Bill 3002 containing Section 75 (s). See Public Document, No. 384, 74th Congress.

On September 10, 1935, the petitioner, The Union Joint Stock Land Bank of Detroit, the mortgage holder which had bid in the land at the void foreclosure sale conducted by the sheriff, procured the State Court to confirm the sale. It recorded its deed from the sheriff on the following day. R. 12, last ten lines.

The new Section 75 (s) so enacted on August 28, 1935, in paragraph (5) contained the provision that "... all cases that have been dismissed by any ... court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, ..." Printed in full at page 6 of this brief.

We think that on August 28, 1935, the United States had reasserted its authority and jurisdiction over the real estate of Mr. Byerly so that the State Court had no power over it.

We think also that the mortgagee-purchaser, the Union Joint Stock Land Bank which is petitioner here,

took the confirmation and deed subject to the paramount authority of the United States over the real estate. As in *Wayne v. Owens-Illinois*, 300 U. S. 131, the mortgagee-purchaser at the foreclosure sale went ahead in the state case knowing that the jurisdiction of the United States Court might be invoked, in fact it knew—as all men must know the law—that thirteen days before it procured confirmation and took its deed, the United States had asserted jurisdiction. On September 24, 1935, the District Court actually formulated the expressed statutory declaration of jurisdiction by reinstating the case. R. 11. At page 135 of the opinion of the court in *Wayne v. Owens-Illinois*, 300 U. S. 131, this court said:

> "The respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefor, to rely on any status acquired in the State Court suit as precluding further consideration of the petition for reorganization."

POINT VI

An act of a court which is performed while it has no power is a nullity and is subject to attack at any time or place.

It was not necessary that the farmer-debtor should notice or contest in any way the act of the state court in conducting sale or in confirming it. It was said by this court in *Kalb v. Feuerstein*, decided January 2, 1940 (at page 7, last paragraph of the printed opinion issued by this court) that

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

The jurisdiction and power of every court to act in any case may be examined by any court in any case at any time. It is only when a court acts within its jurisdiction that its decisions and orders are immune from collateral attack. When acting within its jurisdiction any error or irregularity must be remedied exclusively by appeal.

Precisely the same argument of *res adjudicata* that is followed by the petitioner here was presented to this Court in *Wright v. Union Central*, 304 U. S. 502, and swept aside. The question was whether the property right of the farmer debtor had been divested by the state law. The opinion of this Court at page 507 says:

> "A judgment overruling a defense grounded on the bankruptcy proceedings and awarding possession and damages to the respondent, was affirmed by the Supreme Court of Indiana on April 2, 1937. *Wright v. Union Central*, 7 N. E. (2d) 208. A similar judgment with respect to the rest of the land was affirmed October 26, 1937, *Wright v. Union Central*, Ind. Sup. 10 N. E. (2d) 726."

Beginning at the last paragraph on page 517 this Court said:

"Respondent argues that to subject property bought in at foreclosure sale, to the extended redemption period and other provisions of Section 75 (s) 'would be a direct invasion of the powers reserved to the state by the Constitution, and a violation of [respondent's] property rights theretofore determined by the courts of the State of Indiana in accordance with the law of that State. If the argument is that Congress has no power to alter property rights, because the regulation of rights in property is a matter reserved to the states it is futile. Bankruptcy proceedings constantly modify and affect the property rights established by state law." At page 518, first paragraph: "Property rights do not gain any absolute inviolability in the bankruptcy court because created by state law."

The following cases also illustrate the principle that the jurisdiction and power of all courts is subject to examination in any court and if found lacking the action of the court will be regarded as a nullity.

Elliott v. Peirsol, 26 U. S. (1 Pet.) 328, 340 (1828). Action of ejectment in a Federal Court. The title of the defendant depended upon a certificate of acknowledgment ordered to be recorded by a State Court: The opinion says at page 340:

"It is argued that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford County; and that its proceedings were conclusive upon the matter whether erroneous or not. We agree that if the county court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition that the jurisdiction of the county court could not be questioned, when

> its proceedings were brought collaterally before the Circuit Court. We know of nothing in the organization of the Circuit Courts of the Union which can contradistinguish them from other courts in this respect . . . the jurisdiction of any court exercising authority over a subject matter may be enquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

Thus a void act of the court's agent could not be legalized and made to pass title by the court.

Thompson v. Tolmie (1829), 27 U. S. (2 Pet.) 157, 163:

> **"If there is a total want of jurisdiction, the proceedings are void** and a mere nullity, and confer no right, and afford no jurisdiction, and may be rejected when collaterally drawn in question."

As was said in 1836 by this Court in *Voorhees v. Jackson*, (ex dem. *United States Bank*), 35 U. S. (10 Pet.) 449 at page 473, even the "most solemn proceedings" of this Court "can confer no right which is denied to any judicial act under color of law" if not warranted by the constitution or by the law of the land. The court said, beginning at the bottom of page 474:

> "The line which separates error in judgment from the usurption of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other, **mere waste paper.**"

In this case of *Voorhees v. Jackson*, ejectment was brought in a Federal Court against a defendant who justified his title through prior sale in attachment proceedings in a State Court. This court held that if there had been procedural irregularity, the jurisdiction of the State Court was not involved and that **proceedings within a court's jurisdiction cannot be attacked collaterally in another court** (page 471).

Nine years later *Gaultley v. Ewing*, 44 U. S. (3 How.) 707, presented the same principle where there was not mere procedural irregularity but **lack of power in the court to act.** The facts were as follows: Foreclosure proceedings were completed in a state court by sheriff's sale, the land was purchased by a stranger, and the deed was delivered to him. Later ejectment was brought in the Federal Court in an independent case on the ground that the sheriff's sale was void because the Indiana law required rents and profits first to be offered before selling the real estate. This Court held the purchaser acquired no title because **the sheriff had no power to sell.** Answering the argument that the purchaser did not know the sheriff had not first offered the rents and profits this Court said: "This is a **question of power,** and the answer to the suggestion rests on this: The sheriff's duties are plainly prescribed; **if he has no power to sell, want of knowledge on the part of the purchaser could not confer it, and no such contingency can be let in to help his deed.**" In this Byerly case, it was the federal statute which deprived the sheriff of power. Thus confirmation did not enforce a void sale.

Hickey v. Stewart, 44 U. S. (3 How.) 750 (1840). The defendant was in possession of lands by writ of possession issued from a state court. Ejectment was brought in a Federal Court. After quoting with approval several of its decisions this Court held that **the State Court had no jurisdiction and its "whole proceedings is a nullity."** It reversed the lower Federal Court for allowing the record of the State Court proceeding to be put in evidence. Confirmation of void proceedings did not pass title.

Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, concerned an action of ejectment in a Federal Court. The defendant relied upon State Court proceedings which the plaintiff claimed were void. The opinion at page 125 reads: **"That no individual or public officer can sell and convey a good title to the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents, without hesitation,** and that the person invested with such a power must pursue with precision the course prescribed by law or his act is invalid, is a principle which has been repeatedly exercised in this court."

In the case of *Mitchell v. St. Maxent*, 71 U. S. (4 Wall.) 237, ejectment was brought in the Federal Court against a defendant in possession who claimed under judgment of the State Court. It was asserted that the Federal Court could not examine into the proceedings of the State Court. This Court said in the first paragraph of its opinion that "It is a well-settled principle of law which has often received the sanction of this Court, that the decree or judgment of a court having jurisdiction is binding till reversed, and can not be collaterally attacked,

But the defect in this case occurs after the judgment, and is fatal to Mitchell's title, for purchasers at a judicial sale are not protected, if the execution on which the sale was made was void. **Void process confers no right on the officer to sell, and all acts done under it are absolute nullities.**" The officer who presumed to sell had no power and could convey no title.

Shriver v. Lynn; 43 U. S. (2 How.) 43. A trustee under a state court sold land over which the court had no jurisdiction and the court confirmed the sale. The original owner brought ejectment in a Federal Court. The defense in the Federal Court was the sale confirmed by the State Court. This Court said:

> "The validity of the sale then, must rest upon the fact of its having been made by the trustee and sanctioned by the chancellor. There would seem to be no ground for doubt on this point." **"The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently.** If given deliberately and on a full examination of all the facts, still **it must be regarded as an unauthorized proceeding.** There was no case before the court—nothing on which its judgment could rest. **No court,** however great may be its dignity, **can arrogate to itself the power of disposing of real estate without the forms of law.**"

The foregoing authorities show that the acts of every court, and of its agent, are subject to examination in another court when jurisdiction or power is questioned. The Federal Courts in collateral proceedings unhesitatingly hold void the acts of State Courts.

POINT VII

An Examination of the points presented in the petitioner's brief.

Having presented the applicable law as we understand it, we will now consider the arguments and cases relied upon by the petitioner.

Petitioner's Brief, Page 16, Argument I.

Respondent's answer to Argument I of Petitioner's Brief which reads: "The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court R. (4)."

We think we have conclusively demonstrated at pages 17 to 23 of this brief under our Point III that the mandatory "complete and self-executing statutory exclusion of all other courts" in Section 75 (n), (o) and (p) precluded the District Court from modifying the effect thereof **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."** The first quotation is from the opinion of this Court in *Kalb v. Feuerstein*, decided January 2, 1940. The second is from Section 75 (o).

Petitioner's Brief, Page 20, Argument II.

Respondent's answer to Argument II of Petitioner's Brief which reads: "The order of the District Court modifying the restraining order and permitting the sale, not excepted and not appealed from, became *res adjudicata* and binding upon the respondent."

First Answer: The order of the District Court was void, no appeal was necessary. The District Court

did not have jurisdiction of either person or property of the farmer debtor except as conferred by Section 75 and the jurisdiction there conferred did not include jurisdiction to restore power to the State Court in any other manner than by the procedure prescribed by Section 75 (o), which prohibits it **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner,. . ."** Point III of this brief presented at pages 17 to 23 herein, and Point VI presented at pages 29 to 35 herein, we think fully answer the petitioner's Argument II.

Second Answer: No appeal was possible. The order was issued *ex parte* "upon the oral application" of the mortgagee, "it appearing the applicant has already been put to considerable expense in preparing for sale" and "that debtor will not be prejudiced by permitting the said property to be sold providing confirmation be not had." R. 8, bottom of page. The debtor had neither notice nor knowledge of its issuance. In addition to such an order being wholly void for lack of power in the court to issue it, it was void because the debtor did not have his day in court; it did not accord to him due process of law, as required by the Fifth and Fourteenth Amendments.

We will here consider the cases cited by the petitioner under its Argument II.

McWilliams v. Blackard, 96 Fed. (2d) 43, cited on page 20 of petitioner's brief. Every procedure in the McWilliams case occurred AFTER the present subsection (s) was enacted on August 28, 1935, the petition under Section 75 (a) to (r) having been filed two months thereafter. The Circuit Court of Appeals held the present

subsection (s) to be unconstitutional and directed dismissal of the proceedings. Thereafter this Court held it to be constitutional. Upon these facts the District Court reinstated the amended petition relying upon paragraph (5) of the present subsection (s), which reads: ". . . all cases that have been dismissed . . . because of the Supreme Court's decision holding the **former** subsection (s) unconstitutional, shall be promptly reinstated. The Circuit Court reversed the District Court for the reason that the clause just quoted from the subsection (s) refers not to cases dismissed under the present subsection (s) but, as it said, to the "**former** subsection (s)." No question of state or federal jurisdiction or power was involved. No state court was involved. No question of conflict of jurisdiction was in the case. The Federal Courts had power and jurisdiction and only the Federal Courts acted. The decision of the Circuit Court was final because not appealed. It became the "law of the case.".

Minneman v. Federal Land Bank, 105 Fed. (2d) 363, cited on page 21 of petitioner's brief.

The petitioner again fails to distinguish between the decision or act of a **court having power** and the decision or act of a **court having no power**. The District Court in the present Byerly case had no power to authorize the State Court to sell. The State Court had no power to sell and therefore Mr. Byerly's property rights were never divested. In the *Minneman* case as in the *McWilliams* case the Federal Courts had power to declare an act of Congress unconstitutional even though the subsequent decision of this Court in *Wright v. Vinton* rendered the earlier decisions of the lower Federal Courts erroneous. The Court said in the Minneman opinion: "The

courts early distinguished between the effect of void and voidable orders." At the close of the opinion it said: "Since we hold that there were no proceedings pending to be reinstated upon amendment of Section 75 (s), it is unnecessary for us to discuss this proposition." Had the petitioners appealed from the erroneous decisions of the District Courts, which they did not do, the erroneous decisions would not have become final. Having become final and the courts having had power to render them, the final orders were *res adjudicata* and were not subject to collateral attack.

Petitioner's Brief, Page 23, Argument III.

Respondent's answer to Argument III of Petitioner's Brief which reads: "Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s) followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objecting to such irregularities."

We think that the petitioner's Argument III entirely misconceives the nature of Section 75. The respondent did not abandon his proceedings under Section 75 (a) to (r). He fully completed them and naturally progressed into the original Section 75 (s), all according to statutory procedure. The proceedings under Section 75 (a) to (r) were terminated by the provisions of the law itself and thus ceased to exist. There was nothing to abandon or to dismiss. The proceedings were not nugatory—they had

fully accomplished their purpose of affording to the farmer-debtor an opportunity to seek a composition or extension and the act itself provided for the situation where composition or extension was not accomplished. The act of the District Court in presuming to authorize the State Court to sell in foreclosure contrary to Section 75 (n), (o) and (p) was not a mere "irregularity", it was a "nullity" because the court had no power to do it and therefore the sale was a "nullity" also.

As to the claim of the petitioner that the order of dismissal was "upon application of the debtor" we believe we have quite sufficiently established the uncontradicted misrepresentation of the petitioner upon which it was based and the finding of the court below at pages 9, 10 and 11 of this brief in the second and third paragraphs of Note 1.

Harrison v. Remington, 140 Fed. 385; *Viviano v. Ferguson*, 39 S. W. (2d) 568; and *Piukkula v. Pillsbury*, 42 P. (2d) 921, cited at page 24 of the petitioner's brief are likewise wholly inapplicable. They refer to the general law while we are here concerned with a specific statutory provision under a specific constitutional grant of power. Nothing has occurred in Mr. Byerly's case to render any part of the provisions of Section 75 (a) to (r) ineffective as to the proceedings thereunder. He filed his petition under Section 75 (a) to (r) and thereby brought Section 75 (n), (o) and (p) into effect. Neither a party, nor a court, may dismiss a proceeding that has fully run its course and terminated.

Petitioner's Brief, Page 25, Argument IV.

Respondent's answer to Argument IV of Petitioner's brief which reads: "The so-called sale in the State Court did not change the legal status of the debtor or

his property as he still retained the identical right of redemption secured to him by the provisions of Ohio G. C. Section 11690 up to the time of confirmation by the State Court which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings."

1. We must agree that "the so-called sale in the State Court did not change the legal status of the debtor or his property," because we think, as a legal proposition, it was an utterly void gesture. We have discussed this subject under Point II of this brief beginning at page 16.

2. But as a practical matter it has been of momentus significance to the respondent for because of it he has been put off of his farm and lost the use of it for nearly five years while the petitioner enjoys the use and occupation of it.

3. However if we take it as no doubt the petitioner wishes to be understood, we must say that the law of Ohio requires a foreclosure sale to be advertised for five successive weeks over a period of **thirty days** before the date of sale. (The state statute is shown at page 7 of this brief.) The petitioner procured the State Court to confirm the void sale **within less than thirty days** from the day it procured the order of dismissal from the District Court. Before thirty days had elapsed the same District Court had reinstated the case. Therefore if the petitioner had not had the attempted sale to depend upon it could not have persuaded the State Court to issue a decree of confirmation.

4. This situation is one of many illustrations of the wise purpose of the Congress in enacting Section 75

(o), which puts a stop to all proceedings of every court except those in the court of bankruptcy for composition or extension while they are pending. **Were it not for subsection (o) it would be legal for the mortgage holder, as here, to creep up on the farmer debtor while farmer-debtor proceedings were pending, and pounce upon him at the first moment they were completed and before he could invoke Section 75 (s).** Mr. Byerly, the farmer debtor, had no knowledge that his farm had been sold on November 24, 1934, until ten months thereafter when he learned of the confirmation and the deed from the sheriff to the petitioner. ". . . the first knowledge of the said sale came to this applicant, Carl Byerly, this week [of September 21, 1935]". Quoted from R. 9-10, ~~1st~~ six lines at bottom of page 9 and remainder of paragraph on page 10. Also set out at page 10 of this brief in the second paragraph of Note 1.

Petitioner's Brief, Page 27, Argument V.

Respondent's answer to Argument V of Petitioner's brief which reads: "The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceeding."

We are of the opinion that the State Court had no jurisdiction whatever of either the farmer debtor or of his property when it decreed confirmation of the void sale. This has been discussed in Point V of our Argument at pages 28-29 of this brief.

We are of the further opinion that even if the State Court had jurisdiction of the property when it confirmed the void sheriff's sale, such confirmation was a nullity because a void sale may not be confirmed by any court

any more than it could grant a divorce without a hearing or award damages without a trial. The Constitution by the Fifth and Fourteenth Amendments forbid that any person be deprived of his property without due process of law. Due process of law requires a valid sale before confirmation and deed.

As this Court said in *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (quoted at page 35 of this brief), where there were two confirmations by a State Court of a void sale: "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. **There was no case before the court—nothing on which the judgment could rest.**"

In the following cases, sales of real estate in State Courts were held nugatory by the Federal Courts in independent actions without appeal from state to federal courts.

Gantley v. Ewing, 44 U. S. (3 How.) 707 (see page 33 of this brief.)

Hickey v. Stewart, 44 U. S. (3 How.) 750, (see page 34 of this brief.)

Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, (see page 34 of this brief.)

Mitchell v. St. Maxent, 71 U. S. (4 Wall.) 237 (see page 34 of this brief.)

Boswell v. Otis, 50 U. S. (9 How.) 336.

Shriver v. Lynn, 43 U. S. (2 How.) 43, (see page 35 of this brief.)

The decisions cited by Petitioner under the heading of Argument V, pages 28 to 35, will be here examined.

Robertson v. Howard, 229 U. S. 254, cited at page 28 of Petitioner's brief. This case originated in a bankruptcy court where a referee confirmed a sale of real estate in bankruptcy. Section 75 was not involved. The Supreme Court of Kansas held the sale to be void because the general federal statutes prescribing sale procedure had not been observed. This Court reversed the Kansas Supreme Court for the reason that sale in bankruptcy courts are regulated by the bankruptcy law which gave the referee discretionary power as to the conduct of sales. The referee had full power.

Thompson v. Tolmie, 2 Pet. 157 (27 U. S. 157), cited at page 29 of Petitioner's brief, has been discussed at page 32 of this brief. We deem it sufficient to suggest that in this case this court discussed the general rule governing collateral attack in two classes of situations. First, where a court has power. Second, where it had no power. In this case the court had power—and this court applied the rule. In *Gantley v. Ewing*, 44 U. S. (3 How.) 707, nine years later (discussed at page 33 of this brief) the court had no power—and this court applied the rule.

Hall v. Law, 102 U. S. 461, cited at page 29 of Petitioner's brief, presents the same principle where the court had power and this court applied the general rule.

Briscoe v. Rudolph, 221 U. S. 547, cited at page 29 of Petitioner's brief, was another case where the court had power and this court applied the rule.

Grubb v. Public Utilities, 281 U. S. 470, cited at page 30 of Petitioner's brief. In the State Court (119 Ohio State Reports 264), an application for an interstate motorbus certificate was denied because a "loop route" from Portsmouth, Ohio, across the river to the Kentucky

side and return was held to be only colorable for the purpose of doing intrastate business. An original suit was brought in the United States Court and appealed to this Court. The only federal question involved was whether the commerce clause committed to Federal Courts exclusive jurisdiction of all suits relating to regulation of interstate commerce. The Court said (bottom of page 475): "This view of that clause is quite inadmissable. It has no support in any quarter and is at variance with the actual practice in this class of litigation." The court held that the state and federal courts have concurrent jurisdiction. The State Court had power.

Southern Pacific v. United States, 168 U. S. 1, cited at page 31 of Petitioner's brief is another instance where the court had power and this court applied the rule.

Mitchell v. First National Bank, 180 U. S. 477, cited at page 31 of Petitioner's brief, followed the decision in the preceding Southern Pacific case because in it also the court had power.

Pepper v. Litton, — U. S. —; 60 S. Ct. 238, (decided by this court December 4, 1939), cited at page 31 of Petitioner's brief, holds that a bankruptcy court may determine the validity of a claim reduced to judgment in a State Court. Under its bankruptcy power a court of bankruptcy may go behind that judgment and examine the claim sued on. It is somewhat amusing that in the Circuit Court below the petitioner cited the decision of the Circuit Court of Appeals for the Fourth Circuit and relied upon it there, while in this court it cites and relies upon this court's decision reversing it.

Prebyl v. Prudential, 98 Fed. (2d) 199, cited at page 32 of Petitioner's brief did not involve Section 75 but the Bankruptcy Law of 1898. The sole question was whether a mortgage lien, placed upon real estate six years before the mortgagor was adjudged a bankrupt was discharged by the discharge of the bankrupt. Now the general bankruptcy law does not discharge liens which have attached more than four months preceding bankruptcy. (Section 67.) The opinion states that "On proper application an order was entered in the bankruptcy court authorizing the mortgagee to foreclose its mortgage." While the foreclosure was proceeding in the State Court the bankrupt in due course received his discharge. He then went into the State Court and opposed confirmation of the foreclosure sale on the ground that his discharge in bankruptcy also discharged the lien on the real estate that was being foreclosed. When the State Court decided against him he raised the same question in the Federal Court. In its decision the Federal Court said although it had no doubt of the correctness of the decision of the State Court yet it would put its decision upon the ground that the issue was conclusively settled in the State Court and could not be retried in the Federal Court. The decision followed the rule that as the State Court had exclusive jurisdiction of the subject matter and of the person, its judgment could not be collaterally assailed in any other court.

Montgomery v. Equitable, 83 Fed. (2d) 758, cited at page 32 of petitioner's brief, was another instance of complete power in a court to render a judgment free from collateral attack.

In re 7000 South Shore, 86 Fed. (2d) 499, cited at page 33 of Petitioner's brief, involved Section 77B of the Bankruptcy Act for the rehabilitation of corporations. In 1930, four years before Section 77B was enacted, a foreclosure suit had been filed and a receiver appointed in a state court. Also before Section 77B was enacted the State Court allowed the account of the receiver. Thereafter the 77B proceedings were filed in the Federal Court. The Federal Court of Appeals held that "the State Court had jurisdiction of the parties and the subject matter" and that "the subject matter and the parties being before the court and the issue submitted on proper pleadings, we may not enquire as to the wisdom of the order." The State Court had exclusive jurisdiction and rendered judgment long before Section 77B was enacted.

Rishol v. McPherson, 34 Fed. (2d) 250, cited on page 33 of Petitioner's brief; *Jack v. Hood*, 39 Fed. (2d) 594, cited on page 34; *Gordon v. Ware*, 132 Fed. 444, also cited on page 34, and *Wright v. Schick*, 134 Ohio State, 193, also cited on page 34 of the Petitioner's brief, are all instances of complete power in a court to render a decision which is free from collateral attack.

In concluding the discussion of this Point V of the Petitioner's argument, may it be suggested that no instance will be found in United States federal jurisprudence where a Federal Court is precluded by a judgment of a State Court from adjudicating a question arising out of exclusive federal jurisdiction. *Wright v. Union Central*, 304 U. S. 502, and *Kalb v. Feuerstein*, — U. S. —, (decided January 2, 1940, by this Court) clearly illustrate this statement.

Petitioner's Brief, Page 36, Argument VI.

Respondent's answer to Argument VI of Petitioner's brief which reads: "The case of *Hoyd v. The Citizens Bank of Albany Company,* 89 Fed. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48) is clearly distinguishable upon its facts."

We submit there is no substantial difference between the case of *Hoyd v. Citizens Bank,* 89 Fed. (2d) 105, discussed at page 19 of this brief, and that of *Byerly v. Union Joint Stock Land Bank,* 106 Fed. (2d) 576, which is the subject of the pending petition for certiorari.

1. It seems that the petitioner asserts that an entire violation of Section 75 (o) should be reversed while a little violation of it should be commended and affirmed. Section 75 (o) reads: ". . . the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition. . .; Proceedings for foreclosure of a mortgage on land . . .; Proceedings by way of execution . . .; Proceedings to sell land under or in satisfaction of any judgment . . . ; sale or other proceedings under . . . any . . . mortgage." This statute is inclusive, mandatory, and self-executing. It contains the sole authority for the modification of its provisions "upon petition made to and granted by the judge after hearing and report by the conciliation commissioner." (Set forth in full at page 4 of this brief.)

2. Mr. Byerly, the farmer debtor had no opportunity to prosecute error to the order of the District Court modifying the effect of Section 75 (o). He did not

earn of it until ten months after it was issued. Even if the order had been within the power of the District Court to issue, it was issued without due process of law as has been suggested at page 37 of this brief.

But no error proceeding was required. This court said in its decision of January 2, 1940, in *Kalb v. Feuerstein* at the bottom of page 7 of the court's printed decision:

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

3. The nullity of the sheriff's sale results from Section 75 (n), (o) and (p). **Being a nullity, the State Court had no power to confirm it.** As this court said in *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (discussed at page 35 of this brief): "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest. **No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law.**"

Mr. Byerly's real estate title was never divested by the state court. He still has his right of redemption and he and it are subject to the federal jurisdiction under Section 75.

4. The Petitioner misconceives the question which is—not whether the State Court had jurisdiction when it presumed to confirm a nullity (the void sheriff's sale) but—whether that confirmation divested Mr. Byerly of his real estate. The State Court could not confirm a sale that never was held. **"No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law."** An attempt to do so is *coram non judice* and is subject to collateral attack in any court at any time. It will be given no recognition by any court except to disregard it.

CONCLUSION

We suggest that the judgment of the Circuit Court of Appeals for the Sixth Circuit is not only correct but in conformity with the decisions of all Federal Courts which have considered the issue. The petition for certiorari ought to be denied.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent.

FILE COPY

MAR 5 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF THE RESPONDENT CARL BYERLY

ELMER MCCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent Carl Byerly.

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,
vs.
CARL BYERLY,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF THE RESPONDENT CARL BYERLY

ELMER MCCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent Carl Byerly.

SUBJECT INDEX

Page

Corrections 1

The Applicable Statutes 2

The Question Involved 7

The Facts 7

Argument 10

Point I

The POWER of the Constitution has been invoked by Section 75 of the Bankruptcy Act and it is exclusive. Only such power as has been reposed in the Bankruptcy Court may be exercised 11

The Fundamentals 11

The Power of Bankruptcy Courts is Exclusive and May Not be Surrendered or Extended 14

Point II

An Act of a court which is performed while it has no power is a nullity. 17

The Principle as Stated by This Court 17

Decisions of This Court Holding Acts of Courts Void for Want of Power 21

Decisions of This Court Sustaining Acts of Courts Against Collateral Attack Because of Power to Act 24

Point III

The farmer debtor had title to his farm on August 26, 1935, when his case was dismissed after the holding that the original Section 75 (s) was invalid. R. 9. This is true whether the sheriff's sale was valid or void because at that time there had been no confirmation of the sale in foreclosure 27

The Mortgagor's Right of Redemption in Ohio 27

SUBJECT INDEX

Point IV — Page

The sheriff's sale was void because it was conducted while the farmer debtor proceedings were pending under Section 75 (a) to (r) when the State Court had no power 29

Point V

The District Court order (R. 4) purporting to permit the foreclosure sale to be conducted while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed..... 30

Federal Court decisions on the Point..... 33

Point VI

Even though the District Court had possessed the power to permit the sale, it would have been void because such permission was issued ex parte without notice 38

Point VII

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed. This is the law of Ohio.... 41

Point VIII

The State Court did not have jurisdiction when it attempted to confirm the void sale..... 48

Point IX

An examination of the points presented in the petitioner's brief which accompanied its petition for certiorari 50

Conclusion 62

TABLE OF CASES

B

Baldwin v. Iowa Traveling, etc., 283 U. S. 522 26
Bank of Hamilton v. Dudley, 27 U. S. (2 Pet.) 492 ..... 19, 44, 47
Bank of U. S. v. Moss, 47 U. S. (6 How.) 31 25
Bank of U. S. v. Piatt's Heirs and Administrators, 5 Ohio 540, 541 (cited) 28
Bassett v. Daniels, 10 O. S. 617 45
Boal v. King, 6 Ohio 11 44
Boswell v. Otis, 50 U. S. 9 How.) 336 ..... 22, 48
Briscoe v. Rudolph, 221 U. S. 547 56
Byerly v. Union Joint Stock Land Bank of Detroit, 106 Fed. (2d) 576 ..... 37, 38, 60

C

Cameron v. McRoberts, 16 U. S. (3 Wheat.) 591 25
Chicago v. Schendel, 270 U. S. 611 24
Chicot v. Baxter, — U. S. —, 60 S. Ct. 317 ..... 25, 40, 52
Childs v. Childs, 10 O. S. 339, 75 Am. Dec. 512 (cited) 28
Clore, In re, 11 Fed. Supp. 465 38
Comstock v. Crawford, 70 U. S. (3 Wall.) 376 24
Commercial Bank and Savings Co. v. Woodville Savings Bank Company, 126 O. S. 587; 186 N. E. 444 (cited) 27

D

D'Arcy v. Ketchum, 52 U. S. (11 How.) 165 22
Dartmouth College Case 39
Davis v. Davis, 305 U. S. 32 24
Davis v. Wechsler, 263 U. S. 22 22
Des Moines v. Iowa Homestead, 123 U. S. 552 25
Dowell v. Applegate, 152 U. S. 327 25

E

Ehrhardt v. Hogoboom, 115 U. S. 67 26
Elliott v. Peirsol, 26 U. S. (1 Pet.) 328 ..... 17, 21
Evers v. Watson, 156 U. S. 527 25

F

Federal Land Bank v. Rutten, 102 Fed. (2d) 359 ..... 14, 36

Florentine v. Barton, 69 U. S. (2 Wall.) 210 24
Forsyth v. Hammond, 166 U. S. 506 22
French v. Fyan, 93 U. S. 169 26

G

Guaranty, etc. v. Green, etc., R. R., 139 U. S. 137 ..... 23, 48
Gantley v. Ewing, 44 U. S. (3 How.) 707 ..... 20, 30, 47
Gordon v. Ware, 132 Fed. 444 59
Galpin v. Page, 85 U. S. (18 Wall.) 350 ..... 22, 48
Grubb v. Public Utilities, 119 O. S. 264 56
Grubb v. Public Utilities, 281 U. S. 470 ..... 24, 56
Griffith v. Frazier, 12 U. S. (8 Cranch) 9 ..... 21, 47
Grignon v. Astor, 43 U. S. (2 How.) 319 24
Gross v. Irving, 289 U. S. 342 14

H

Hall v. Law, 102 U. S. 461 56
Hardt v. Kirkpatrick, 91 Fed. (2d) 875 37
Harris v. Hardeman, 55 U. S. (14 How.) 334 22
Harrison v. Remington, 140 Fed. 385 54
Hickey v. Stewart, 44 U. S. (3 How.) 750 ..... 22, 47
Hines v. Lowry, 305 U. S. 85 22
Hoofnagle v. Anderson, 20 U. S. (7 Wheat.) 212 25
Hopkins v. Clyde, 71 O. S. 141, 72 N. E. 846; 104 Am. St. Rep. 737; 1 Ann. Cas. 1000 (cited) 28
Hoyd v. Citizens Bank, 89 Fed. (2d) 105 ..... 26, 34, 59
Hudson v. Guester, 10 U. S. (6 Cranch) 281 26
Hurst v. Fisher, 64 O. S. 530 46

I

In re Clore, 11 Fed. Supp. 465 38
In re 7000 South Shore, 86 Fed. (2d) 499 58
In re Wogstad, 27 ABR NS 363 34
Iowa Homestead v. Des Moines, 84 U. S. (17 Wall.) 153 25
Isaacs v. Hobbs, 282 U. S. 384 14

J

Jack v. Hood, 39 Fed. (2d) 594 59
Johnson v. Towsley, 80 U. S. (13 Wall.) 72 23
Johnson v. Zerbst, 304 U. S. 458 23

TABLE OF CASES

K

Page

Kalb v. Feuerstein (U. S. S. Ct.) decided January 2, 1940 ..... 15, 30, 33, 48, 51, 59, 60
Kansas v. Dunmeyer, 113 U. S. 629 23
Kemp v. Kennedy, 9 U. S. (5 Cranch) 173 24

L

Louisville, etc. v. Radford, 295 U. S. 555 8
Ludlow v. Johnston, 3 Ohio 553, 577 ..... 18, 19, 44

M

Martin v. Alter, 42 O. S. 94, 98 (cited) 28
Minneman v. Federal Land Bank, 105 Fed. (2d) 363 52
Minter v. Crommelin, 59 U. S. (18 How.) 87 26
Mitchell v. First National Bank, 180 U. S. 477 57
Mitchell v. St. Maxent, 71 U. S. (4 Wall.) 237 ..... 23, 48
Montgomery v. Equitable, 83 Fed. (2d) 758 58
Moore v. Dempsey, 261 U. S. 86 23
Moore v. Robbins, 96 U. S. 530 23
Morgan v. Mason, 20 Ohio 401 45
Morgan v. United States, 304 U. S. 1 ..... 39, 45

Mc

McArthur v. Franklin, 16 O. S. 193 (cited) 27, 28
McCormick v. Sullivant, 23 U. S. (10 Wheat.) 192 25
McWilliams v. Blackard, 96 Fed. (2d) 43 ..... 51, 52

N

Naylor v. Cantley, 96 Fed. (2d) 761 36
Noble v. Union etc. R. R., 147 U. S. 165 26

O

Old Wayne v. McDonaugh, 204 U. S. 8 23

P

Patterson v. Winn, 24 U. S. (7 Wheat.) 380 25
Pennoyer v. Neff, 95 U. S. 714 ..... 22, 47
Pepper v. Litton, — U. S. —, 60 S. Ct. 238 57
Pinkkula v. Pillsbury, 42 P. (2d) 921 54
Polk v. Wendal, 13 U. S. (9 Cranch) 87 25
Prebyl v. Prudential, 98 Fed. (2d) 199 57

Q

Quinby v. Conlon, 104 U. S. 420 26

R

Reed v. Radigan, 42 O. S. 292 45
Richland County Mutual Insurance Company v. Sampson, 38 O. S. 672 (cited) 27, 28
Rishol v. McPherson, 34 Fed. (2d) 250 59
Robertson v. Howard, 229 U. S. 254 56
Robinson v. Fife, 3 O. S. 551 (cited) 28
Rose v. Himely, 8 U. S. (4 Cranch) 241 17

S

St. Louis v. Kemp, 104 U. S. 636 26
Re Sawyer, 124 U. S. 200 22
7000 South Shore, In re, 86 Fed. (2d) 449 58
Shriver v. Lynn, 43 U. S. (2 How.) 43 ..... 20, 22, 46, 61
Simms v. Slacum, 7 U. S. (3 Cranch) 300 24
Sites v. Wiedner, 35 O. S. 555 45
Steel v. St. Louis, 106 U. S. 447 26
Stoll v. Gottlieb, 305 U. S. 165 ..... 25, 39
Southern Pacific v. U. S., 168 U. S. 1 57
Sun Fire Office of London v. Clark, 53 O. S. 414; 42 N. E. 248; 38 LRA 562 (cited) 27, 28

T

Taylor v. Fowler, 18 Ohio 567; 51 Am. Dec. 469 (cited) 28
Taylor v. Sternberg, 293 U. S. 470, 473 ..... 14, 21
Thatcher v. Powell, 19 U. S. (6 Wheat.) 119, 125 ..... 23, 47
Thompson v. Tolmie, 27 U. S. (2 Pet.) 157, 163 ..... 26, 56
Thompson v. Whitman, 85 U. S. (18 Wall.) 457 22

U

U. S. v. Arredondo, 31 U. S. (6 Pet.) 691 25
U. S. v. Southern Pacific, 146 U. S. 615 23

V

Valley v. Northern, 254 U. S. 348 ..... 16, 21
Vance v. Burbank, 101 U. S. 514 26
Viviano v. Ferguson, 39 S. W. (2d) 568 54
Voorhees v. (Jackson) U. S. Bank, 35 U. S. (10 Pet.) 449, 473 ..... 19, 24

W

Page

Ex parte Watkins, 280 U. S. (3 Pet.) 193 26
Wayne v. Owens-Illinois, 300 U. S. 131 49
Webster v. Reid, 52 U. S. (11 How.) 437 ..... 22, 48
Wilcons v. Penn Mutual, 91 Fed. (2d) 417 35
Wilcox v. Jackson, 38 U. S. (13 Pet.) 498 23
Williamson v. Berry, 49 U. S. (8 How.) 495 ..... 21, 47
Wise v. Withers, 7 U. S. (3 Cranch) 331 21
Wogstad, In re, 27 ABR NS 363 34
Wright v. Schick, 134 O. S. 193 59
Wright v. Union Central, 304 U. S. 502 ..... 15, 48, 59
Wright v. Vinton, 300 U. S. 440 15

STATUTES CITED

Constitution of the United States
Article I, Section 8 ..... 11, 31
Article VI 11
Section 75 (c) 2, 12
Section 75 (n) (original) 2
Section 75 (n) (amended) (Act of August 28, 1935) 2, 12
Section 75 (o) 4, 12
Section 75 (p) (amended) (Act of August 28, 1935) 5, 13
Section 75 (s) (amended) (Act of August 28, 1935) 5, 6, 13
General Code of Ohio, Section 11588 ..... 6, 41
General Code of Ohio, Section 11654 ..... 6, 41
General Code of Ohio, Section 11690 ..... 6, 27, 54
General Code of Ohio, Section 11681 ..... 6, 7, 55
General Code of Ohio, Section 11682 ..... 7, 55

AUTHORITIES

Page

Congressional Record, 74th Congress, 1st Session, page 14691. Report of Mrs. Caraway from the Committee on Enrolled Bills 34

42 Corpus Juris, "Mortgages," Section 1864, page 227 43

Freeman on Judicial Sales, Sections 23, 42 42

4 Jones on Mortgages, 8th Ed., Section 2099 (old numbering 1633), page 579 42

24 Ohio Jurisprudence, 79 28

24 Ohio Jurisprudence, "Judicial Sales," Section 4 41

27 Ohio Jurisprudence, "Mortgages," Section 486 41

27 Ohio Jurisprudence, "Mortgages," Section 519 41

27 Ohio Jurisprudence, 727, 728 (cited) 20

Public Document 384 48

6 Ruling Case Law, "Constitutional Law," 442 39

16 Ruling Case Law, "Judicial Sales," Section 3, page 8 43

16 Ruling Case Law, "Judicial Sales," Section 19, page 25 43

Senate Bill 3002 34

Wiltzie on Mortgage Foreclosure, 4th Edition, Section 735 43

Supreme Court of the United States

October Term, 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF RESPONDENT CARL BYERLY

(All emphasis in this brief, is supplied unless noted otherwise.)

CORRECTIONS

Errors appear in the paging of citations contained in the opinion of the Circuit Court below as printed in the Record at pages 43 to 48 [fol. 48 to 53]. They are here corrected.

R. 45 [fol. 49], third line from top of R. 45. *Louisville v. Radford*, should read *295* U. S. 555 (instead of "293" U. S.).

R. 47 [fol. 52], last paragraph on R. 47. *Thatcher v. Powell*, should read 19 U. S. *119, 125* (instead of "54, 56.").

R. 48 [fol. 52], ninth line from top of R. 48. *Voorhees v. United States Bank*, should read 35 U. S. *449, 473* (instead of "298, 316.")

R. 48 [fol. 52], tenth line from top of R. 48. *Thompson v. Tolmie*, should read 27 U. S. *157, 163* (instead of "97, 99.")

R. 48 [fol. 52], last full line of first paragraph on R. 48. *Elliott v. Peirsol*, should read 26 U. S. *328* (instead of "248.")

THE APPLICABLE STATUTES

Section 75 (c) (Act of March 3, 1933, 11 U. S. C., Section 203 (c)):

> ". . . a petition may be filed by any farmer stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts . . ."

Section 75 (n) (as originally enacted in the Act of March 3, 1933, 11 U. S. C. Section 203 (n)):

> "**The filing of a petition** pleading for relief under this section **shall subject the farmer and his property,** wherever located, **to the exclusive jurisdiction of the court. In proceedings under this section,** except as otherwise provided herein, **the jurisdiction and powers of the court,** the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, **shall be the same as if** a voluntary petition for adjudication had been filed and **a decree of adjudication had been entered on the day when the farmer's petition** or answer **was filed.**"

On August 28, 1935, when the present Section 75 (s) was enacted, the above Section 75 (n) was amended to read as follows:

Section 75 (n) (Act of August 28, 1935, 11 U. S. C., Section 203 (n)):

> "**The filing of a petition** or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under Section 75 of this act, as amended, **shall immedi-**

ately subject the farmer and all of his property, wherever located, for all the purposes of this section, **to the exclusive jurisdiction of the court, including** all real or personal property, or **any equity or right in any such property,** including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, **the right or the equity of redemption where the period of redemption has not or had not expired,** or where a deed of trust has been given as security, **or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.**

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute **or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section.** The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. **In proceedings under this section,** except as otherwise provided herein, **the jurisdiction and powers of the courts,** the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, **shall be the same as if** a voluntary petition for adjudication had been filed and **a decree of adjudication had been entered on the day when the farmer's petition,** asking to be adjudged

a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding the same to the clerk of court."

The following, Section 75 (o), has never been amended:

Section 75 (o) (Act of March 3, 1933, 11 U. S. C., Section 203 (o)):

"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

Section 75 (p) as amended in the Act of August 28, 1935, 11 U. S. C., Section 203 (p):

"(p) **The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court** or under the direction of any official, **and shall apply** to all creditors, public or private, and **to all of the debtor's property,** wherever located. **All such property shall be under the sole jurisdiction and control of the court in bankruptcy,** and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 of this Act."

Section 75 (s) (Act of August 28, 1935, 11 U. S. C., Section 203 (s)):

From the first, unnumbered paragraph of Section 75 (s):

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and or extension proposal; or if he feels aggrieved by the composition and or extension **may amend his petition** or answer, **asking to be adjudged a bankrupt.** Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged encumbered, or unencumbered, be appraised, and that his unencumbered exemptions and unencumbered interest or equity in his exemptions as prescribed by state law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. . . ."

Paragraph (5) of Section 75 (s):

"(5) **This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Act,** as well as to future cases; **and all cases that have been dismissed by any** conciliation commissioner, referee, or **court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated,** without any additional filing fees or charges. . . ."

General Code of Ohio, Section 11588: **"When a mortgage is foreclosed,** or a specific lien enforced, **a sale of the property shall be ordered. . ."** 27 Ohio Jurisprudence "Mortgages," Section 486: "Under the Code, when a mortgage is foreclosed, a sale of the property must be ordered; . . . this leaves the court no discretion as to whether there shall be a sale."

General Code of Ohio, Section 11690:

"Judgment Debtor May Redeem Any Time Before Confirmation.—In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale . . . (R. S. Section 5389a.)"

(Note: In relation to General Code of Ohio, Section 11684, which is quoted below, it should be said that in Ohio **sales of real estate in forcelosure** are always **"as upon execution."** General Code of Ohio, Section 11654, provides that "Executions are of three kinds: (1) against the property of the judgment debtor, **including orders of sale;** . . ." Also that, as stated in 27 Ohio Jurisprudence "Mortgages," Section 519: "A sale of mortgaged premises, ordered and made in a proceeding for foreclosure, is in its nature a judicial sale . . .")

General Code of Ohio, Section 11681:

> **"Notice of Time and Place.—Lands** and tenements **taken in execution shall not be sold until the officer causes public notice to be given** of the time and place of sale, **for at least thirty days before the day of sale,** by advertisement in a newspaper . . . (112 v. 261; R. S. Section 5393. Eff. Aug. 9, 1927.)"

General Code of Ohio, Section 11682, provides that such notice shall be published once a week for **five consecutive weeks.**

THE QUESTION INVOLVED

There is but one legal issue involved. It may be stated thus:

When the United States District Court disclaimed the farmer debtor's farm on October 22, 1936 (R. 17), did he then have a property right in it? If he did, he is entitled to have his property dealt with in accordance with Sectino 75.

THE FACTS

Stated within the smallest possible compass the essential facts are:

1. The respondent as farmer debtor filed his petition in the District Court under Section 75 for composition or extension of his debts. There was then pending a foreclosure suit brought by the petitioner here against him and his farm in the State Court. The sheriff's advertisement of sale was then running. R. 1. R. 2, "Schedule 'B'" and "Statement".

2. Upon application of the farmer debtor, the district judge issued a restraining order restraining the sheriff and the mortgage holder from conducting the foreclosure sale. R. 4, middle of page.

3. Four days later upon the oral application of the mortgage holder, the petitioner here, the district judge modified the restraining order, without compliance with Section 75 (o), by purporting to authorize the sheriff to hold the foreclosure sale but continuing the restraining order against confirmation by the State Court. R. 4-5. The sheriff sold the farm the next day on November 24, 1934. R. 12, middle of Paragraph 1. **The farmer debtor had no knowledge of the sale until ten months later, in September,** 1935. R. 9, at R. 10, eighth and ninth lines.

4. Failing to attain composition or extension of his debts under Section 75 (a) to (r) the farmer debtor filed his amended petition under the original Section 75 (s) and was adjudged a farmer debtor bankrupt on February 11, 1935. R. 7-8. See the first unnumbered paragraph of Section 75 (s) at page 5 of this brief.

5. This court on May 27, 1935, in *Louisville v. Radford*, 295 U. S. 555, held invalid the original Section 75 (s), under which the proceedings were pending.

6. On August 26, 1935 (just two days before the President approved the present Section 75 (s) on August 28, 1935), the proceeding was dismissed because of said decision. R. 8-9.

7. As stated in the foregoing Paragraph 6, two days after the dismissal of the farmer debtor proceedings the present Section 75 (n), the present Section 75 (p), and the present Section 75 (s) became law on August 28, 1935. Paragraph (5) of the new Section 75 (s) provided that ". . . all cases that have been dismissed by any conciliation commissioner, referee or court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated, . . ." (set forth in full at page 6 of this brief)

8. Twelve days after the new Section 75 (s) became effective, the mortgage holder, the petitioner here, applied to the State Court and secured a purported confirmation of the sheriff's sale which had been conducted during the pendency of the farmer debtor proceedings under Section 75 (a) to (r). R. 12, Paragraph 1.

9. Upon learning that his farm had been sold in foreclosure ten months after it occurred, the farmer debtor applied for reinstatement of his case in the District Court pursuant to the new Section 75 (s) and for an order restraining the mortgagor from alienating his farm. An order of reinstatement was entered on September 24, 1935. Application for reinstatement, R. 9-10. Statement of the farmer debtor that he had just learned of the sale of his farm, R. 10, last seven lines at end of the paragraph continued over from R. 9.[1] Order of Reinstatement, R. 11.

10. The mortgage holder filed its "Motion to Dismiss the Application for Reinstatement" on November 14, 1935. R. 11. It filed its motion to disclaim the farm from the farmer debtor proceedings on May 8, 1936. R. 11.

11. The District Court's order of disclaimer was entered October 22, 1936, R. 17-19. A Petition for Rehearing, R. 20-24, was denied on May 6, 1937. R. 34, top of page. Motions by the farmer debtor to refer his case to a conciliation commissioner under the new Section 75 (s) were denied. R. 32-36.

12. Proceedings on appeal. R. 37-42.

---

[1] ". . . the first knowledge of the said sale came to this applicant, Carl Byerly, this week, . . ."

ARGUMENT

Point I.

The POWER of the Constitution has been invoked by Section 75 of the Bankruptcy Act and it is exclusive. Only such power as has been reposed in the Bankruptcy Court may be exercised.

Point II.

An act of a court which is performed while it has no power is a nullity.

Point III.

The farmer debtor had title to his farm on August 26, 193[illegible] when his case was dismissed after the holding that the original Section 75 (s) was invalid. R. 9. This is true whether the sheriff's sale was valid or void because at that time there had been no confirmation of the sale in foreclosure.

Point IV.

The sheriff's sale was void because it was conducted while the farmer debtor proceedings were pending under Section 75 (a) to (r), when the state court had no power.

Point V.

The District Court order (R. 4) purporting to permit the foreclosure sale to be conducted while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed.

Point VI.

Even though the District Court had possessed the power to permit the sale, it would have been void because such permission was issued ex parte without due process.

Point VII.

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed.

Point VIII.

The State Court did not have jurisdiction when it attempted to confirm the void sale.

Point IX.

An examination of the points presented in the petitioner's brief which accompanied its petition for certiorari.

POINT I.

The POWER of the Constitution has been invoked by Section 75 of the Bankruptcy Act and it is exclusive. Only such power as has been reposed in the Bankruptcy Court may be exercised.

The Fundamentals.

In this case the determination of the issue involves the subject of **judicial power** as distinguished from jurisdiction of the person or of the property.

Article 1, Section 8, of the Constitution reposes in the Congress exclusive and all-inclusive potential power over the subject of bankruptcy in the words: "The Congress shall have Power . . . to establish uniform Laws on the subject of bankruptcies throughout the United States . . . And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article VI provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land;

and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding . . . all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;"

The Congress exercised its Constitutional power in the enactment of Section 75 of the Bankruptcy Act and by it delegated that power and provided for its administration as follows: (The sections quoted from are set out more fully at pages 1 to 6 of this brief.)

Section 75 (c): "A petition may be filed by any farmer stating . . . that it is desirable to effect a composition or extension."

Section 75 (n): "The filing of a petition . . . shall immediately subject the farmer and all of his property . . . to the exclusive jurisdiction of the court including . . . any equity or right in any such property . . . the right or equity of redemption . . . or where the sale has not or had not been confirmed or where deed had not been delivered, at the time of filing the petition.

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired . . . or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section . . . In proceedings under this section . . . the jurisdiction and powers of the courts . . . shall be the same as if a . . . decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed."

Section 75 (o): "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt or account, . .

(2) Proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of land;

(4) Proceedings by way of execution . . .

(5) Proceedings to sell land under or in satisfaction of any judgment . . .;

(6) . . . sale or other proceedings . . . under any . . . lien . . . or mortgage . . .

Section 75 (p): "The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court . . . and shall apply . . . to all of the debtor's property . . . All such property shall be under the sole jurisdiction . . . All such property shall be under the sole jurisdiction and control of the court in bankruptcy."

Section 75 (s): "Any farmer failing to obtain the acceptance of a majority . . . of all creditors . . . may amend his petition . . ."

Section 75 (s) (5): "This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Act . . .; and all cases that have been dismissed by any . . . court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated."

The Power of Bankruptcy Courts Is Exclusive and May Not Be Surrendered or Extended.

The bankruptcy power is exclusive in the bankruptcy courts and it may not be surrendered or delegated.

1. In *Isaacs v. Hobbs*, 282 U. S. 734, this court said, at page 739: "The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the **power** of the court's officials to oust it by surrender of the property which has come into its possession. Indeed a court of bankruptcy itself is **powerless** to surrender its control of the administration of the estate."

2. In *Gross v. Irving*, 289 U. S. 342, at page 344, this court again said: "Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself."

3. *Taylor v. Sternberg*, 293 U. S. 470, 473. "But with the filing of the petition in bankruptcy the **power** of the State Court in that respect ceased; and its order fixing the compensation of the receiver and his counsel **was a nullity** because made without jurisdiction — that having passed to the bankruptcy court."

4. In *Federal Land Bank v. Rutten*, 102 Fed. (2d) 359, the Circuit Court of Appeals for the Eighth Circuit held in answer to the petition of a secured creditor to abandon a portion of the mortgaged real estate in farmer debtor proceedings under Section 75: "The court is **powerless** to surrender its jurisdiction over the encumbered exemptions of the debtor except in the way provided by the statute."

5. In *Wright v. Union Central*, 304 U. S. 502, the farmer debtor litigated his rights in two state court cases during the pendency of farmer debtor proceedings in the bankruptcy court. He was defeated in both cases in the highest court of the state but did not seek appeal or certiorari. (The opinions of the State Supreme Court are set forth in full at pages 43 to 46 and 47 to 52 of the brief of the respondent (Union Central Life Insurance Company) filed in this court in the case—*Wright v. Union Central*, Nos. 715, 716, October term, 1937). The lower federal courts both held that the property rights of the farmer debtor had been finally determined by the state courts.

In the opinion of this court it was said at page 507: "A judgment overruling a defense grounded upon the bankruptcy proceedings, and awarding possession and damages to respondent, was affirmed by the Supreme Court of Indiana . . A similar judgment with respect to the rest of the land was affirmed October 26, 1937." And at page 516: "Respondent urges that to subject property bought in at a foreclosure sale to the extended redemption period and other provisions of Section 75 (s) 'would be a direct invasion of the powers reserved to the state by the Constitution, and a violation of [respondent's] property rights theretofore determined by the courts of the state of Indiana in accord with the law of that state.'"

"If the argument is that Congress had no power to alter property rights, because the regulation of rights in property is a matter reserved to the states, it is futile." At page 518: "Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law."

6. *Kalb v. Feuerstein*, — U. S. —, 60 S. Ct. 343. Bottom of page 3 of the printed opinion issued by this court.

and at 60 S. Ct. 346: "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not therefore subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."

7. *Vallely v. Northern*, 254 U. S. 348. In 1910 Section 4 (b) of the Bankruptcy Act of 1898 was amended to read: "any . . . corporation except . . . [an] insurance . . . corporation may be adjudged an involuntary bankrupt upon default or an impartial trial."

An involuntary petition was filed against an insurance corporation. Process was served on the corporation and upon default it was adjudged a bankrupt. There was no appeal. The administration proceeded; a trustee was appointed; claims were presented and allowed; assets were reduced to money; payments were made to protect equities; suits were entered by the trustee; considerable money was paid out and expenses were incurred by the trustee; and the officers of the corporation cooperated with the trustee.

Thereafter the corporation moved to vacate the adjudication as null and void. The decision of this court, at page 355, was that the Act of 1910, "is peremptory in its prohibitions . . . The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations and necessarily **there is no power in the district court** to include them. At page 356 the court said: "For a court to extend the act to corporatoins of either kind is to enact a law not to execute one."

POINT II.

An act of a court which is performed while it has no power is a nullity.

Once it has been determined that a court has **no power** to act upon a subject it is an inseparable conclusion that all of its acts relative to that subject are nullities. Questions of concurrent jurisdiction, res judicata, and collateral attack, pertain to instances of actions by a court **within its judicial power,** but are extraneous considerations if the court act without power.

The Principle As Stated By This Court.

Each case discussed now to be cited under this Point II involved a decision of another court in a separate action. Each was a collateral attack upon a judgment in a different proceeding.

1. *Rose v. Himely,* 8 U. S. (4 Cranch) 241 (1808). "Upon principle, it would seem that the operation of every judgment must depend on the **power of the court** to render that judgment; or in other words on its jurisdiction over the subject matter which it has determined."

2. In *Elliott v. Peirsol,* 26 U. S. (1 pet.) 328 (1828, this court had to decide whether real estate was conveyed when a Kentucky court ordered the record of a separate examination of a wife in the acknowledgment to a deed. The Kentucky statute required the separate examination of the wife to be recorded to pass the title of a married woman. After the death of the wife, the Kentucky court authorized the county clerk to record his certificate showing the separate examination of the wife. This court held that the deed was void "because the county court had no jurisdiction or **authority** to order the said second certificate to be made."

This court discussed the application of the principle to opposite situations. At page 340, where it said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court. But, if it act **without authority** its judgments and orders are regarded as nullities. They are not voidable but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgment or sentences are considered in law as trespassers."

"This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

3. In an Ohio case, decided in 1828, precisely the same law and facts were involved as in a case pending at the same time in this court, which was decided one year later in 1829. The Ohio case was *Ludlow v. Johnson*, 3 Ohio Reports, 553 (1828). The Common Pleas Court of Ohio in 1804 issued an order to sell Lot 103 in Cincinnatti. The statute under which the court acted was repealed and then no sale having been made, the court extended the order to sell and the sale was made. The question was whether title was conveyed. Years afterward, ejectment was brought against the grantees of the purchaser at that sale. The Supreme Court of Ohio in its opinion at page 576 said: "This is strictly a question of **power.** Had the Court of Common Pleas **power**; had they jurisdiction to make the order in question? Could they in any shape act upon the subject

matter? **It is not sufficient that they might once have had jurisdiction,** that they might have had it in May, for instance, **but the jurisdiction must still remain when the act is done." . . .** When jurisdiction over any particular subject is withdrawn from a court, the effect is the same as to that subject, **as if the court itself was abolished.**

4. The case in which this court followed the decision of the Ohio Supreme Court in *Ludlow v. Johnson* just quoted from was *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492 (1829), which case referred to the same Lot 103 in Cincinnati and involved the same law and facts. This court said: "We are satisfied that there was no error in the instructions given by the Circuit Court to the jury." The instructions had been that the jury should disregard all evidence of the deed authorized by the Ohio Common Pleas Court.

5. In *Voorhees v. Jackson*, 35 U. S. (10 Pet.) 449 (1836), this court again discussed both sides of the principle as applied to the opposite conditions of facts. It said at page 474 of the opinion: "The errors of the court do not impair their validity: binding until reversed, any objections to their full effect must go to the **authority** under which they have been conducted. If not warranted by the Constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done coram non judice; that is, by persons assuming the judicial functions in the case **without lawful authority."**

"The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an

action concerning the matter adjudicated or purporting to have been done. **In the one case, it is a record importing absolute verity; in the other mere waste paper; there can be no middle character** assigned to judicial proceedings which are irreversible for error."

In this case the court whose judgment was attacked **had power** and the judgment was effective.

6. Nine years later, this court had before it a case in which it applied the principle where the **power was lacking.** It was *Gantley v. Ewing*, 44 U. S. (3 How.) 707, (1845) where the court at page 715 of the opinion in answer to the suggestion that the purchasers at a sheriff's sale in a state court had no notice of the defect in the proceedings, said: "This is a question of **power** and the answer to the suggestion rests on this: the sheriff's duties are plainly prescribed; if he has no **power** to sell, want of knowledge on the part of the purchaser could not confer it, and no such contingency can be let in to help his deed."

7. *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (1844), page 60 of the opinion: "The validity of the sale then must rest upon the fact of its having been made by the trustee and sanctioned by the chancellor . . . the sale being without authority, the ratification of it by the court must have been considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court, nothing on which the court could rest. No court, however great may be its dignity, can arrogate to itself the **power** of dispossessing of real estate without the forms of law." "A decision without notice would be **treated as a nullity.** And so must a sale of land be treated which has been made without an order, **though it may have been ratified.**"

8. *Williamson v. Berry*, 49 U. S. (8 How.) 495 (1850), was a case involving a sale of real estate in the court of Chancellor Kent in the New York State Court. In two decisions of the highest courts of the state of New York in two cases, the validity of the sale authorized by Chancellor Kent had been upheld. The State Court held that if there had been any error, it was not subject to collateral attack. However, when the question came before this court in an ejectment case, it said at page 540 of the opinion: "We concur that neither orders or decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence that the jurisdiction of any court exerting authority over a subject may be enquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefits of such proceedings." The court then quoted extensively from its decision in *Elliott v. Peirsol*, 26 U. S. (1 Pet.) 328, which has been quoted above at 2.

Decisions of This Court Holding Acts of Courts Void For Want of Power.

No power granted:

1. *Vallely v. Northern*, 254 U. S. 348, 1929. Bankruptcy. Discussed at page 16 of this brief.

2. *Taylor v. Sternberg*, 293 U. S. 470, 1935. Bankruptcy. Discussed at page 14 of this brief.

3. *Wise v. Withers*, 7 U. S. (3 Cranch) 331, 1806. Court martial of civilian.

4. *Griffith v. Frazier*, 12 U. S. (8 Cranch) 9, 1814. Appointment of administrator de bonis non. State Court.

5. *Elliott v. Peirsol*, 26 U. S. (1 Pet.) 328, 1828. *Nunc pro tunc* entry of record. Discussed at page 17 of this brief. State Court.

6. *Hickey v. Stewart*, 44 U. S. (3 How.) 750, 1845. No jurisdiction granted to State Court.

7. *Thompson v. Whitman*, 85 U. S. (18 Wall.) 457, 1874. Seizure of ship outside of county. State Court.

8. *Re Sawyer*, 124 U. S. 200, 1888. No power in federal court to intervene in state litigation.

9. *Forsyth v. Hammond*, 166 U. S. 506, 1897. No power in federal court to intervene in state litigation.

Congressional prohibition:

10. *Davis v. Weschler*, 263 U. S. 22, 1923. Place of suit, federal control of railroads. State Court.

11. *Hines v. Lowry*, 305 U. S. 85, 1938. Attorney fee to guardian of veteran. State Court.

Lack of due process of law:

12. *Shriver v. Lynn*, 43 U. S. (2 How.) 43, 1844. Ratification of sale held without authority. Discussed at pages 20 of this brief. State Court.

13. *Boswell v. Otis*, 50 U. S. (9 How.) 336, 1850. Sale of non resident's lot 107. Proceedings against lot 109. State Court.

14. *D'Arcy v. Ketchum*, 52 U. S. (11 How.) 165, 1850. No service. State Court.

15. *Webster v. Reid*, 52 U. S. (11 How.) 437, 1850. Judgment against non resident. No attachment, no notice. State Court.

16. *Harris v. Hardeman*, 55 U. S. (14 How.) 334, 1852. Faulty service on resident. State Court.

17. *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 1874. No service on non resident. State Court.

18. *Pennoyer v. Neff*, 95 U. S. 714, 1878. No service on non resident. Discussed at page 47 of this brief. State Court.

19. *Guaranty v. Green, etc., RR*, 139 U. S. 137, 1891. Faulty service on non resident. State Court.

20. *Old Wayne v. McDonaugh*, 204 U. S. 8, 1907. No service on non resident. State Court.

21. *Moore v. Dempsey*, 261 U. S. 86, 1923. Criminal trial mere farce. State Court.

22. *Johnson v. Zerbst*, 304 U. S. 458, 1938. Criminal trial without attorney.

23. *Thatcher v. Powell*, 19 U. S. (6 Wheat.) 119, 1821. State Court. Sale of land without previous levy on chattels, etc. Page 125. "That no individual or public officer can sell and convey a good title to the land of another unless authorized so to do by express law is one of those self-evident propositions to which the mind assents without hesitatino; and that the person invested with a power must pursue with precision the course prescribed by law or his act is invalid is a principle which has been repeatedly recognized in this court."

24. *Mitchell v. St. Maxent*, 71 U. S. (4 Wall.) 237, 1866. State Court. Lack of notice to heirs of deceased judgment debtor.

Land patents:

25. *Wilcox v. Jackson*, 38 U. S. (13 Pet.) 498, 1839. Land reserved. No power to issue patent. State Court.

26. *Johnson v. Towsley*, 80 U. S. (13 Wall.) 72, 1871. Government office. Mistake of law.

27. *Moore v. Robbins*, 96 U. S. 530, 1878. Government office. Mistake of law.

28. *Kansas, etc., R. R. v. Dunmeyer*, 113 U. S. 629, 1885. Land reserved. No power to issue patent.

29. *United States v Southern Pacific R. R.*, 146 U. S. 615, 1892. Land reserved. No power to issue patent.

Decisions of This Court Sustaining Acts of Courts Against Collateral Attack Because of Power to Act.

The following decisions of this court illustrate the principle that when a court has power to act, its decisions, if erroneous, are subject only to appeal. They become res judicata and will be sustained against collateral attack. They are divided into two groups of decisions which were attacked, first those of State Court, second, those of Federal Courts.

Decisions of This Court Sustaining Acts of State Courts Against Collateral Attack Because Power Existed.

1. *Davis v. Davis*, 305 U. S. 32, 1938. Matrimonial domicil.

2. *Chicago, etc., R. R. v. Schendel*, 270 U. S. 611, 1926. Interstate or intrastate commerce. Concurrent jurisdiction.

3. *Grubb v. Public Utilities Commission*, 281 U. S. 470, 1930. Interstate or intrastate commerce. Concurrent jurisdiction. Discussed at page 56 of this brief.

4. *Simms v. Slacum*, 7 U. S. (3 Cranch) 300, 1806. Facts proving insolvency.

5. *Kemp v. Kenedy*, 9 U. S. (5 Cranch) 173, 1809. Facts proving treason.

6. *Voorhees v. Jackson*, 35 U. S. (10 Pet.) 449, 1836. Facts necessary to jurisdiction.

7. *Grignon v. Astor*, 43 U. S. (2 How.) 319, 1844. Facts necessary to jurisdiction.

8. *Florentine v. Barton*, 69 U. S. (2 Wall.) 210, 1865. Facts necessary to jurisdiction.

9. *Comstock v. Crawford*, 70 U. S. (3 Wall.) 376, 1866. Facts necessary to jurisdiction.

Decisions of This Court Sustaining Acts of Federal Courts Against Collateral Attack Because Power Existed.

10. *Stoll v. Gottlieb*, 305 U. S. 165, 1938. Bankruptcy. Jurisdiction over ancillary contract. Discussed at page 39 of this brief.

11. *Chicot v. Baxter*, — U. S. —, 60 S. Ct. 317, 1940. Bankruptcy. Constitutionality. Discussed at page 40 of this brief.

12. *Cameron v. McRoberts*, 16 U. S. (3 Wheat.) 591, 1818. Jurisdiction. Diversity of citizenship.

13. *McCormick v. Sullivant*, 23 U. S. (10 Wheat.) 192, 1825. Jurisdiction. Diversity of citizenship.

14. *Bank of United States v. Moss*, 47 U. S. (6 How.) 31, 1848. Jurisdiction. Diversity of citizenship.

15, 16. *Iowa Homestead v. Des Moines Navigation*, 84 U. S. (17 Wall.) 153, 1873, and *Des Moines v. Iowa Homestead*, 123 U. S. 552, 1887. Jurisdiction. Diversity of citizenship.

17. *Dowell v. Applegate*, 152 U. S. 327, 1894. Jurisdiction. Diversity of citizenship and violation of federal law.

18. *Evers v. Watson*, 156 U. S. 527, 1895. Jurisdiction. Diversity of citizenship.

19. *Polk v. Wendal*, 13 U. S. (9 Cranch) 87, 1815. Preliminaries to land patent.

20. *Hogsdatgle v. Anderson*, 20 U. S. (7 Wheat.) 212, 1822. Preliminaries to land patent.

21. *Paterson v. Winn*, 24 U. S. (11 Wheat.) 380, 1826. Preliminaries to land patent.

22. *United States v. Arrendondo*, 31 U. S. (6 Pet.) 691, 1832. Preliminaries to land patent.

23. *Minter v. Crommelin*, 59 U. S. (18 How.) 87, 1856. Preliminaries to land patent.

24. *French v. Fyan*, 93 U. S. 169, 1876. Preliminaries to land patent.

25. *Vance v. Burbank*, 101 U. S. 514, 1880. Preliminaries to land patent.

26. *Quinby v. Conlon*, 104 U. S. 420, 1882. Preliminaries to land patent.

27. *St. Louis, etc., v. Kemp*, 104 U. S. 636, 1882. Preliminaries to land patent.

28. *Steel v. St. Louis, etc.*, 106 U. S. 447, 1882. Preliminaries to land patent.

29. *Ehrhardt v. Hogoboom*, 115 U. S. 67, 1885. Preliminaries to land patent.

30. *Nobel v. Union, etc., R. R.*, 147 U. S. 165, 1893. Preliminaries to land patent.

31. *Thompson v. Tolmie*, 27 U. S. (2 Pet.) 157, 1829. Age necessary to jurisdiction. This case is discussed at page 56 of this brief.

32. *Ex Parte Watkins*, 280 U. S. (3 Pet.) 193, 1830. Whether indictment charged offense.

33. *Baldwin v. Iowa Traveling, etc.*, 283 U. S. 522, 1931. Determination of service.

34. *Hudson v. Guestier*, 10 U. S. (6 Cranch.) 281, 1810. Determination of distance by foreign court.

We think the foregoing decisions cited and discussed under this Point II determine this instant Byerly case. As the Bankruptcy Court had no power to authorize the sheriff to sell, the attempted sale was a nullity. As there was no sale the State Court could not divest the farmer debtor of his title by an order purporting to confirm a sale that never occurred. We discuss these matters in detail in the remainder of this brief.

Point III.

The farmer debtor had title to his farm on August 28, 1935, when his case was dismissed after the holding that the original Section 75 (s) was invalid. R. 9. This is true whether the sheriff's sale was valid or void because at that time there had been no confirmation of the sale in foreclosure.

The Mortgagor's Right of Redemption in Ohio.

In Ohio, by General Code, Section 11690 (printed in full at page 6 of this brief), a mortgagor retains the fee simple title to his mortgaged land, and he has an equity of redemption from foreclosure until confirmation of the sheriff's sale.

In its unanimous decision the Circuit Court of Appeals for the Sixth Circuit, which has jurisdiction over Ohio, in *Lloyd v. Citizens Bank*, 89 Fed. (2d) 105 (at page 107, beginning at the foot of the second column and continuing in the first column on page 108, found that:

> **"The Ohio courts have repeatedly recognized that the equity of redemption includes both the right to redeem and the substantial estate of the mortgagor.** They hold that this estate exists not only from the execution of the mortgage until condition broken, but also between the time of condition broken and of sale. *McArthur v. Franklin*, 16 Ohio St. 193; *Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Commercial Bank and Savings Company v. Woodville Savings Bank Co.*, 126 Ohio St. 587, 186 N. E. 444.
>
> **As sale in Ohio is not complete until valid confirmation** (Section 11690, General Code; *Richland County Mutual Insurance Co. v. Sampson*, 38 Ohio St. 672), **appellant at the time he filed his petition had an equity of redemption consisting of an estate and not of a mere right to redeem. Under Ohio law this constitutes property.**

The equity of redemption in Ohio is a substantial estate subject to dower (*Taylor v. Fowler*, 18 Ohio 567, 51 Am. Dec. 469; *McArthur v. Franklin*, supra); to conveyance and judicial sale (*Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Hopkins v. Clyde*, 71 Ohio St. 141, 72 N. E. 846, 104 Am. St. Rep. 737, 1 Ann. Cas. 1000), and descendible to the heirs upon the death of the mortgagor (*Bank of United States v. Piatt's Heirs and Adm'rs*, 5 Ohio 540, 541; *Robinson v. Fife*, 3 Ohio St. 551; *Martin v. Alter*, 42 Ohio St. 94, 98). It constitutes a real and beneficial estate descendible by inheritance and only alienable by deed (*McArthur v. Franklin*, supra), and is an insurable interest in land (*Richland County Mutual Insurance Co. v. Sampson*, supra; *Sun Fire Office of London v. Clark*, supra). **If the confirmation of sale is unauthorized or is refused the purchaser at judicial sale obtains no vested right** (24 Ohio Jurisprudence, 79; 27 Ohio Jurisprudence, 727, 728; *Richland County Mut. Insurance Co. v. Sampson*, supra). The latest expression of the Ohio Supreme Court as to the equity of redemption is found in *Commercial Bank and Savings Co. v. Woodville Savings Bank Co.*, supra, which holds that 'The right to rents and profits of real estate follows the legal title. Consequently a mortgagor in possession is entitled to the rents and profits of the real estate, as an incident of possession of the equity of redemption, and they may be collected by such mortgagor until his equity of redemption expires.'

We conclude that as the sale had not been confirmed at the time of filing the petition, appellant's equity of redemption had not been barred, and that it constituted 'property' which was subject to the jurisdiction of the Federal Court under subsection (n). The foreclosure proceedings and the proceedings for sale thereunder were therefore stayed by the operation of subsection (o)."

Consequently it is established that the farmer debtor in this case was in no degree divested of his real estate by the sheriff's conduct of a sale, even if the sheriff had authority to sell during the pendency of his farmer debtor proceedings in the Federal Court under subsections (a) to (r).

But the sheriff had no power to sell.

POINT IV.

The sheriff's sale was void because it was conducted while the farmer debtor proceedings were pending under Section 75 (a) to (r) when the State Court had no power.

The attempted sale by the sheriff, which was held when proceedings under Section 75 (a) to (r) for composition or extension were pending was void because it was prohibited by Section 75 (n) and (o). Section 75 (n), which is set out in full at page 2 of this brief, reposes exclusive power in the bankruptcy court by the general provision that "The filing of a petition . . . under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court."

Section 75 (o), which is also set out in full at page 4 of this brief, specifically prohibited any foreclosure sale being held. It reads: **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property** at any time after the filing of the petition under this section and prior to the confirmation or other disposition of the composition or extension proposal by the court:" Then follows the designation of foreclosure and other forms of actions which are prohibited.

This Court in its recent decision in *Kalb v. Feuerstein*, which was announced on January 2, 1940, determined that Section 75 (o) is self-executing and mandatory. In the printed decision issued by this Court it is said on page 7, at the end of the unfinished paragraph at the top of the page: "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved after filing a petition for composition and extension . . . of the necessity of litigation elsewhere and its consequent expense. This was accomplished by **granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.**"

POINT V.

The District Court order (R. 4) purporting to permit the foreclosure sale to be conducted while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed.

The Congress by statute, (Section 75 (n), (o), and (p)), having withdrawn all power from the State Court, such **power could be restored only by the Congress which withdrew it.** It did so in Section 75 (o) by making clear, and exclusive, provision for the restoration of power to the State Court. This provision is that such power may not be restored **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."**

In the interpretation of a statute in 1845, this court followed reasoning which would seem to be applicable here in the interpretation of Section 75 (o). That case was *Gantley v. Ewing*, 44 U. S. (3 How.) 707 (1845). Referring

to a statute of the state of Indiana, the court said at page 714: "The general power to sell lands at auction and outcry is given, but then follows the explicit restriction that the fee-simple shall not be sold until the rents and profits have been first offered at public auction and outcry; if they bring the amount of the execution, the sheriff is to convey to the purchaser the term of seven years and put him forthwith into possession. Had the **power** to sell stopped here, then no authority to convey the fee would exist; and the question is, when did the power arise? We think, on the failure of the sheriff to get a bid of the whole amount of the levy for a term of seven years; as before, the fee could not be sold."

So in Section 75 (o) in this case it would seem by like reasoning that if the statute had stopped with the words: "the following proceedings shall not be instituted, or . . . maintained in any court," there would have been no power anywhere to authorize foreclosure proceedings to be maintained. The invocation by the Congress of constitutional power to authorize foreclosure proceedings after "petition made to and granted by the judge after hearing and report by the conciliation commissioner" is clearly the only way by which **power** may be restored to a state court to maintain foreclosure proceedings.

Any method of restoring power to the State Court, which might be attempted, other than that prescribed by the Congress, would be judicial legislation which is prohibited by the Constitution in Article I, Section I, providing that "All legislative powers herein granted shall be vested in a Congress of the United States, . . ." Section 8 of the same Article I provides that "The Congress shall have Power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States; . . ." And in

Article VI it states that "This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby . . ." And further that ". . . all judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . ."

This case illustrates the wise purpose of the Congress in enacting Section 75 (o) which puts a stop to all proceedings in every court except those for composition or extension while they are pending. **Were it not for Section 75 (o) it would be legal for the mortgage holder, as here, to creep up on the farmer debtor and procure a sale to be held while proceedings for composition or extension were pending and to pounce upon him at the first moment after they were completed and before he could invoke Section 75 (s).** A sale held during farmer debtor proceedings would be a farce—a gift to the mortgage holder—for no stranger would bid the true value of the farm because he would have to take it subject to the pending proceedings. The conciliation commissioner, to whom the proceedings are referred for administration, alone has full opportunity to examine at first hand into the merits of an application to permit a sale. He is the only proper authority to hear such an application and to recommend its allowance or dismissal. He alone can rightfully determine whether a sale of any specific property can be permitted without defeating the purpose of the proceedings.

The District Court's "ORDER MODIFYING RESTRAINING ORDER ISSUED NOVEMBER 19, 1934" (R. 4) was therefore clearly void and ineffective to restore any modicum of power to the State Court.

Federal Court Decisions on the Point.

All Federal Courts which have had to decide whether power may be restored to a State Court without following the statutory procedure of (1) application to the judge, (2) reference to a conciliation commissioner, (3) hearing by the conciliation commissioner, (4) report thereon to the judge, (5) consideration of the report by the judge, and (6) grant of power by the judge, have uniformly held that it may not. It is difficult to understand how it could be otherwise since any other interpretation would defeat the purpose of the law to give the farmer-debtor an opportunity to rehabilitate himself by proceedings required to be conducted before the conciliation commissioner.

Here are presented the decisions of all reported federal cases upon the subject.

1. In *Kalb v. Feuerstein*, — U. S. —, 60 St. Ct. 343, this court said at the bottom of the printed opinion issued by this court and at 60 S. Ct. 346, second column: "We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the **power** and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent **after hearing** of the bankruptcy court in which the farmer's petition was then pending:"

At the bottom of page 5 of the printed opinion issued by this Court and at 60 S. Ct. 347, bottom of first column: "This Congress repeatedly stated its unequivocal purpose to prohibit—in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceeding against the farmer

to sell under mortgage foreclosure, to confirm such sale, or to dispossess under it.

This congressional purpose is more apparent in the light of the Frazier-Lemke Act's legislative history." The opinion then traces the history of the amendments to the Act and quotes from the Reports of the Senate and House Judiciary Committees.

At the bottom of page 7 of the printed opinion issued by this court and at 60 S. Ct. 348, bottom of second column: "Congress manifested its intention that the issue of jurisdiction in the foreclosure court need not be contested or even raised by the distressed farmer debtor. . . . considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the **plenary power** of Congress over bankruptcy has been exercised as in this Act."

2. *In re Wogstad*, 27 ABR NS 363. February 8, 1935. District Court of Wyoming, Judge Kennedy:

"Undoubtedly a bankruptcy court has the jurisdiction and the right to allow a creditor to proceed under the first clause of paragraph (o) but **this would seem to be limited to a petition made to and granted by the judge after hearing and report by the conciliation commissioner."**

3. *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105. March 12, 1937. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Simons, and Allen, Circuit Judges. Opinion by Judge Allen.

After a sale in foreclosure and just before it was about to be confirmed the farmer debtor filed his petition under Section 75 (a) to (r). The district judge restrained confirmation of the foreclosure sale but later vacated the

injunction upon motion by the mortgagee. The court said: "No hearing has been held before the commissioner, and no report has been made by him to the court. Hence the prerequisites for securing leave of court to proceed with the sale are lacking. Subsection (o) squarely applies and is mandatory" . . . **"The prerequisite to proper dissolution of the restraining order was that a petition shall be made to and granted by the judge after hearing and report by the conciliation commissioner.** Appellee could have insisted upon a report from the conciliation commissioner; but it took no such action."

4. *Wilcons v. Penn Mutual*, 91 Fed. (2d) 417. July 6, 1937. Circuit Court of Appeals for the Tenth Circuit, before Lewis, Phillips and Bratton, Circuit Judges. Opinion by Judge Lewis.

Foreclosure had proceeded to sale; confirmation and certificates of purchase to the purchasers. The farmer remained in possession but the mortgagees claimed the farmer had no interest in the land. The court held "But if there was good and sufficient reason why the land could not be administered in the bankruptcy court, either because it did not belong to Wilcons or belonged to another at the time the petition was filed, or because Wilcons' interest and right thereto had terminated, **then subsection (o) of Section 75 provides a remedy to the true owner.**" . . . "Whether appellees' names are in or out of the bankruptcy files and proceedings has no effect on the jurisdiction of the bankruptcy court conferred by **subsection (n) which coupled with subsections (o) and (p) operate as an injunction against everyone unless and until lifted in the way provided by subsection (o).**"

5. *Naylor v. Cantley*, 96 Fed. (2d) 761. May 16, 1938. Circuit Court of Appeals for the Eighth Circuit, before Gardner, Sanborn and Thomas, Circuit Judges. Opinion by Judge Sanborn.

In this case two matters were simultaneously pending in the same United States District Court. One was a foreclosure suit against a farmer debtor. The other was his petition, which he filed in the same court under Section 75 (a) to (r) after the filing of the foreclosure action. Thereafter the foreclosure sale was conducted by the District Court and confirmed. The mortgagee contended that "since the bankruptcy proceedings and the foreclosure suit were both pending in the United States District Court for the Eastern District of Arkansas, and that since the same judge had both matters in charge, the orders made and the things done by the court sitting as a court of equity are to be regarded as though made or sanctioned by the court of bankruptcy." The court held that "Since under the provisions of Section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since that court could not surrender its jurisdiction to any other court, **it was incumbent upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75 of the Bankruptcy Act.**"

6. *Federal Land Bank v. Rutten*, 102 Fed. (2d) 359, March 14, 1939. Circuit Court of Appeals for the Eighth Circuit. Before Judges Sanborn, Woodrough and Thomas, Circuit Judges. Opinion by Judge Thomas.

In its opinion upon a petition by a secured creditor seeking the dismissal of a portion of the mortgaged real estate from the proceedings the court said: "Further, the

statute provides [subsection (p)] that 'all of the debtor's property, wherever located . . . shall be under the sole jurisdiction and control of the court in bankruptcy'. **The court is powerless to surrender its jurisdiction over the encumbered exemptions of the debtor except in the way provided in the statute.**"

7. *Byerly v. Union Joint Stock Land Bank of Detroit*, 106 Fed. (2d) 576. September 18, 1939. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Allen and Hamilton, Circuit Judges. Opinion by Judge Hicks.

This is the instant case now before this court on petition for certiorari. As in the *Hoyd* case, (number 3 in this group of cases) the District Court, without following the mandatory provisions of subsection (o), assumed to authorize the foreclosure proceedings to be conducted while proceedings under Section 75 (a) to (r) were pending.

Upon these facts the court said: "We think that the order modifying the original restraining order to permit the sheriff to proceed with the sale was void. It was made prior to the appointment of a conciliation commissioner and of course prior to any hearing and report by him. The sheriff's sale was an essential step in the proceeding for foreclosure, and **the court was not only unauthorized to allow it but its allowance was expressly prohibited by subsection (o) of Section 75. The order lay without the scope of the court's jurisdiction.**"

There have been a few reported decisions which are sometimes cited as authority not in accord with the decisions just referred to. However, upon examination of the texts of these decisions, it will be found that they may not be so cited. For example: In *Handt v. Kirkpatrick*, 91 Fed. (2d) 875, CCA 9, **the case had passed out**

of Section 75 (a) to (r) for composition or extension into Section 75 (s) for the three-year moratorium by an amended petition. The court held that Section 75 (o) (printed in full at page 4 of this brief) by its express terms applies only to the period prior to the disposition of the farmer debtor's proposal under Section 75 (a) to (r). Likewise in the case of *In re Cloie* 11 Fed. Supp. 465, decided by the District Court for the Western Division of Kentucky, all proceedings under Section 75 (a) to (r) had been completed and the State Court did not proceed during the pendency under Section 75 (a) to (r). Judge Hamilton, who rendered this Cloie decision, was also one of the three Circuit Court of Appeal Judges who heard the instant case of *Byerly v. Union Joint Stock Land Bank of Detroit*, now before this court on petition for certiorari which held that subsection (o) is mandatory and self-executing.

POINT VI.

Even though the District Court had possessed the power to permit the sale, it would have been void because such permission was issued ex parte without notice.

The order of November 19, 1934, issued by the District Court purported to empower the sheriff to proceed with the sale. (R. 4, bottom of page.) It was issued ex parte without notice to the farmer debtor, who learned of it some ten months later.

The following quotations are from the order. R. 4-5. It was issued "upon the oral application of the Union Joint Stock Land Bank of Detroit." It "appearing that applicant has already been put to considerable expense in preparing for sale". The order expressed the opinion that "debtor will not be prejudiced by permitting the said property to be sold providing confirmation be not had."

He did not learn of the issuance of the order until some ten months later in September, 1935, just before he filed his application for reinstatement. R. 9 at R. 10, eighth and ninth lines.

He could not be estopped by the lapse of ten months from objecting to the sale of his farm because he was during all of that time unaware that it had occurred. There could be no res judicata against him who did not know, and had no opportunity to know, that such an order had issued.

The Fifth Amendment provides that no person shall be deprived of property without due process of law, than which there is no principle of law more firmly established in our jurisprudence. "The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." 6 Ruling Case Law "Constitutional Law," Section 442. Daniel Webster in the Dartmouth College Case defined it to mean "a law which hears before it condemns." This Court with emphasis recently protected the right of due process of law in *Morgan v. United States*, 304 U. S. 1. In that case the party involved fully participated in an open hearing and in argument but was afforded no opportunity to examine the order before it was issued.

In the following cases there was notice and the fullest opportunity to be heard. Due process of law was accorded.

In *Stoll v. Gottlieb*, 305 U. S. 165, certain bonds and their guaranty were cancelled by the bankruptcy court's confirmation of a plan of corporate reorganization under Section 77B. A holder of such bonds sued on the guaranty in a state court. He claimed the bankruptcy court had no jurisdiction over the guaranty. This court held that the cancellation of the guaranty by the bankruptcy court was

res judicata as to the bond holder because (1) he had notice of the hearing on the plan to cancel the guaranty, (2) he did not appear to object, (3) holders of bonds under the same guaranty appeared and objected, (4) the question was one for judicial determination, (5) he subsequently filed a petition in the bankruptcy court to vacate the confirmation of the plan and it was denied, and (6) he did not appeal from any of the orders of the bankruptcy court. He had his day in court and was estopped.

In *Chicot v. Baxter*, — U. S. —, 60 S. Ct. 317, a plan of debt readjustment under the first Municipal Debt Readjustment Act of May 24, 1934, was completely executed by confirmation of the bankruptcy court after notice and hearing, by cancellation of existing securities and by issuance of new securities purchased for value by a new creditor. Thereafter this court held the Act to be invalid, whereupon the holders of the old securities brought suit claiming the proceedings were void. This court decided that the suitors (1) as holders of the bonds (2) had notice of the debt readjustment proceedings; (3) that they had full opportunity to object to the plan and (4) the validity of the Act; that (5) all parties and the court assumed the Act to be valid, (6) which was a question for judicial determination, and (7) no review of the decree was sought. The bondholders, having had full opportunity in the proceedings to raise the very issue submitted in a subsequent suit, they were estopped by res judicata.

Even if it be assumed that in the instant case the bankruptcy court under Section 75 had the power to authorize sale in foreclosure of the farm without observing the procedure prescribed in Section 75 (o) while proceedings were pending for composition or extension, the order authorizing the sale was issued without notice and without

opportunity to be heard. It could not be res judicata as to the farmer debtor.

POINT VII.

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed. This is the law of Ohio.

In Ohio a sheriff's sale is an essential requisite to proceedings in foreclosure. The General Code of Ohio, Section 11588, provides that "When a mortgage is foreclosed, or a specific lien is enforced, a sale of the property shall be ordered." In 27 Ohio Jurisprudence "Mortgages", at Section 486, it is said that "Under the Code, when a mortgage is foreclosed, a sale of the property must be ordered; . . . **this leaves the court no discretion as to whether there shall be a sale.**" It is also to be noted that in Ohio sales of real estate in foreclosure are made "as upon execution." It is provided in the General Code of Ohio, in Section 11654, that "Executions are of three kinds: (1) against the property of the judgment debtor, including orders of sale;". In 27 Ohio Jurisprudence "Mortgages", Section 519, it is stated that "A sale of mortgaged premises, ordered and made in a proceeding for foreclosure, is in its nature a judicial sale . . ."

As the State Court was **without power** when the sheriff's sale was conducted such sale was a nullity. The sale being a nullity, no subsequent confirmation could endow it with validity. The State Court had no power to confirm a void sale. Some of the authority for these statements follows:

> 24 Ohio Jurisprudence, "Judicial Sales", Section 4: **"An order, judgment or decree of sale by a court without jurisdiction is void** and not merely voidable. As a logical consequence **the sale based thereon is**

likewise an absolute nullity. The rule is equally applicable whether the lack of jurisdiction has reference to the subject matter or to the person. So a **void judgment, order or decree** in whatever tribunal it may be entered, **is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it are void. Hence a sale based on such judgment has no foundation in law; it must fall. Judicial proceedings are void when the court wherein they take place is acting without jurisdiction."**

Freeman on Judicial Sales, Sections 23, 42: "A void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. All acts performed under it and all claims flowing out of it, are void. Hence a sale based on such judgment has no foundation in law; **it must certainly fall."**

Upon the filing of Mr. Byerly's petition under Section 75 **the power of the Common Pleas Court became as nonexistent as if its decree of sale had been issued when it had no power.** Whether a sheriff's sale be void for lack of an order of sale to support it, or by express prohibition of the supreme law of the land under the bankruptcy power, in either event, **the sheriff is without power to act, and his act is a mere nullity.** Therefore, the sale conducted by the sheriff while his court had no jurisdiction "must certainly fall" —no right could accrue from it. Confirmation of the **"nullity"** can not cause it to convey title. Restoration of jurisdiction to his court after he had presumed to conduct a void sale could not impart validity to his void act.

4 Jones on Mortgages, Eighth Edition, Section 2099, (old numbering 1633), page 579: "A sale under a foreclosure decree is void if **conducted in a manner which would not have been in the power of the court to authorize."**

Wiltzie on Mortgages—Foreclosure, Fourth Edition, Section 735: "But **confirmation will not make good a defect arising from a want of jurisdiction in the court, . . .**"

16 Ruling Case Law, "Judicial Sales," Section 3, Page 8: "And **it is even beyond the power of the legislature to validate by retroactive legislation a judicial sale of real estate which was void for want of jurisdiction in the court to make it,** at least without making provision for compensation to the owner of the property."

16 Ruling Case Law, "Judicial Sales", Section 19, Page 25: "A **sale made by an officer acting without such authority must be treated as a nullity, even though it be subsequently ratified by the court.** Purchasers at a judgment sale are protected when the power to make the sale is expressly given, not otherwise." "Furthermore, **an original lack of authority cannot be supplied at a later stage in the proceedings in such a manner as to validate the sale by relation.** Thus a sale by a trustee, not authorized to sell under a decree though reported to the court and ratified and confirmed by it after public notice, must be treated as a nullity. In such a case ratification does not bring the sale within the rule which applies where the court has jurisdiction but has committed an error in its proceedings. **The sale being without authority, ratification of it by the court** must be considered as given inadvertently; or if given deliberately and on a full examination of all the facts, still it **must be regarded as unauthorized and void.**"

42 Corpus Juris, "Mortgages", Section 1864, Page 227: "**Confirmation cures all defects and irregularities excepting those which would make the sale absolutely void, such as want of jurisdiction.**"

The courts of Ohio have always supported the doctrine of the texts which have just been quoted.

1. *Ludlow v. Johnston*, 3 Ohio Reports 553 (1828). In an action of ejectment, the defendant offered to prove his title to part of "Lot 103" through a judicial sale of "Lot 103" in a former proceeding. The plaintiff claimed the sale was a nullity because it was conducted when the power of the court in the former proceeding had been withdrawn by repeal of a statute. The Supreme Court of Ohio said at page 576: **"This is strictly a question of power. Had the Court of Common Pleas power;** had they jurisdiction to make the order in question? Could they in any shape act upon the subject matter? **It is not sufficient that they might once have had jurisdiction,** that they might have had it in May for instance, **but the jurisdiction must still remain when the act is done." "When jurisdiction over any particular subject is withdrawn from a court, the effect is the same as to that subject, as if the court itself was abolished."** "Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry correct any mistake or error which may have been committed while they possessed the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subject."

2. (Note: The same defense of title to another portion of the same "Lot 103" was offered in *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492 (1829) pending at the same time. This court reached the same conclusion as that of the Ohio Supreme Court. This court sustained the lower federal court in rejecting as evidence of title to "Lot 103" the sale conducted in the former state court proceeding.)

3. *Boal v. King*, 6 Ohio Reports 11 (1833). After judgment a writ of execution and levy was issued which was invalid. **Subsequently a valid order of sale was issued and upon it sale was made and con-**

firmed. In a subsequent case of ejectment involving title based upon that sale the court held that no title had been conveyed. In commenting on another case the Court said that implied confirmation never was held to supply **defects of power."**

4. *Morgan v. Mason*, 20 Ohio Reports 401, at 408 (1851). The issue was whether plaintiffs obtained title in a former case through a deed delivered by a sheriff after levy, and sale, **which had been confirmed by the court.** The court said: **"Without** a judgment, levy, and **sale, the sheriff possesses no more power** or authority **to convey the lands** of a debtor, **than any private person; and consequently** without those indispensable requisites, **can give no better title** to them."

5. *Bassett v. Daniels*, 10 Ohio State Reports, 617, 619 (1858). Judge Swan said that the purchaser takes no title and **there is no authority to make a deed until it is "judicially determined that the sale has been legally made."**

6. *Sites v. Wiedner*, 35 Ohio State Reports 555 (1880). The court confirmed a sale in foreclosure of a certain "lot two" which had been decreed to be sold, but was omitted from the sheriff's appraisement, and a deed was delivered to the purchaser. In subsequent action brought by the mortgagor, his title was cleared thus holding the **sale of "lot two" to have been void although it had been confirmed.**

7. *Reed v. Radigan*, 42 Ohio State Reports 292 (1884). Before there was any statutory right to redeem, the sheriff sold lands in foreclosure. All proceedings were regular. A statute provided that if the sale was made in conformity to the statute, the clerk **"shall be directed"** by the court to make an entry that the sheriff made a deed. After sale was completed the debtor paid the debt. The Court held that notwithstanding the regularity of the pro-

ceedings and the mandatory provisions requiring confirmation, the confirmation should be set aside. The payment of the judgment **deprived the court of all power** to confirm the sale.

8. *Hurst v. Fisher*, 64 Ohio State Reports, 536 (1901). **After confirmation of sale, delivery of deed and distribution of the purchase price,** the owner brought an independent action to set the sale aside, on the ground that purchase by an appraiser was void. The sale was set aside. Here there was a **valid order of sale** but, as in the Byerly case, **the sale was void for a reason extraneous to the physical conduct of the sale.** In the Hurst case it was the purchase by the appraiser; in the Byerly case it was the supreme law of the land expressed in subsections (n) and (o), which **deprived the sheriff of power.**

It seems to be clearly demonstrated that in Ohio the sale in foreclosure proceedings is a separate and essential function of the court and not merely an incident which may be disregarded. **Foreclosure can not be completed without a sale.** This sale by the sheriff being a nullity it was legally nonexistent and confirmation could not make it effective. Ohio law holds the confirmation of a void sale to be ineffective to divest the mortgagor of title. A court has no power to confirm a sale when none was legally held.

This court has never hesitated to hold sales authorized or confirmed by state courts to be void.

9. As this court said in *Shriver v. Lynn*, 43 U. S. (2 How) 43 (quoted at page 20 of this brief), where there were two confirmations by a State Court of a void sale: "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts still it must be regarded as an unauthorized proceed-

ing. **There was no case before the court—nothing on which the judgment could rest."**

10. In *Pennoyer v. Neff*, 95 U. S. 714, where the State Court in a separate action not appealed from had sold property of a nonresident without service, appearance, or attachment, it was argued that since the land was within the state, a judgment against a nonresident might be satisfied by subsequent seizure of the land and its sale on execution. This court said: "If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant . . . the judgment if void when rendered will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there is none . . . the contrary is the law; **the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."**

In the following additional cases, sales of real estate in State Courts were held nugatory by the Federal Courts in independent actions without appeal from state to federal courts.

11. *Griffith v. Frazier*, 12 U. S. (8 Cranch) 9, (see page 21 of this brief).

12. *Thatcher v. Powell*, 19 U. S. (6 Wheat.) 119, (see page 23 of this brief).

13. *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492 (see page 19 of this brief).

14. *Gantley v. Ewing*, 44 U. S. (3 How.) 707 (see pages 20 and 30 of this brief).

15. *Hickey v. Stewart*, 44 U. S. (3 How.) 750 (see page 22 of this brief).

16. *Williamson v. Berry*, 49 U. S. (8 How.) 495 (see page 21 of this brief).

17. *Boswell v. Otis*, 50 U. S. (9 How.) 336 (see page 22 of this brief).

18. *Webster v. Reid*, 52 U. S. (11 How.) 437 (see page 22 of this brief).

19. *Mitchell v. St. Maxent*, 71 U. S. (4 Wall.) 237 (see page 23 of this brief).

20. *Galpin v. Page*, 85 U. S. (18 Wall.) 350.

21. *Guaranty, etc. v. Green, etc., R. R.*, 139 U. S. 137, (see page 23 of this brief).

22. *Wright v. Union Central*, 304 U. S. 502, (see page 15 of this brief).

23. *Kalb v. Feuerstein*, — U. S. 60 S. Ct. 343, (see pages 15, 30, 33, 51, 60 of this brief).

POINT VIII.

The State Court did not have jurisdiction when it attempted to confirm the void sale.

On August 24, 1935, the present Section 75 (s), having passed both Houses as a part of Senate Bill 3002, was presented to the President for signature. See Congressional Record, 74th Congress, 1st Session, Page 14691. Report of Mrs. Caraway from the Committee on Enrolled Bills.

On August 26, two days later, Mr. Byerly's proceedings were dismissed because this Court had held the original subsection (s) to be invalid. R. 8, end of paragraph at top of R. 9.

On August 28, the President approved Senate Bill 3002 containing Section 75 (s). See Public Document, No. 384, 74th Congress.

On September 10, following, the petitioner, The Union Joint Stock Land Bank of Detroit, the mortgage holder which had bid in the land at the void foreclosure sale, procured the State Court to "confirm" the sale. It recorded its deed from the sheriff on the following day. R. 12, last ten lines of paragraph I.

The new Section 75 (s) contained in paragraph (5) the provision that "all cases that have been dismissed by any . . . court because of the Supreme Court decision holding the former subsection (s) unconstitutional, **shall be promptly reinstated".** Printed in full at page 6 of this brief.

We think that on August 28, 1935, the United States had reasserted its bankruptcy power over the real estate of Mr. Byerly so that the State Court had no power over it.

We think also that the mortgagee-purchaser, the Union Joint Stock Land Bank, took the confirmation and deed subject to the paramount authority of the United States over the real estate. At page 135 of the opinion of this court in *Wayne v. Owens-Illinois,* 300 U. S. 131, it was said:

> "The respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefor, to rely on any status acquired in the State Court as precluding further consideration of the petition for reorganization.

As in *Wayne v. Owens-Illinois*, the mortgagee-purchaser at the foreclosure sale went ahead in the state case knowing that the jurisdiction of the United States Court might be invoked. In fact, it knew—at least as all men must know the law—that on August 28th, thirteen days before it procured confirmation and took its deed, the United States had reasserted its power over the Byerly case, which had

been dismissed "because of the Supreme Court decision holding the former subsection (s) unconstitutional."[2]

On September 24, 1935, the District Court actually formulated the expressed statutory declaration of power by reinstating the case. R. 11.

POINT IX.

An Examination of the points presented in the petitioner's brief which accompanied its petition for certiorari.

Having presented the applicable law as we understand it, we now desire to consider the arguments and cases relied upon by the petitioner in its brief which accompanied its petition for a writ of certiorari. No other brief on behalf of the petitioner has been served upon counsel for the respondent.

Petitioner's "Argument I" in Its Brief in Support of Its Petition for Certiorari, Page 16.

Argument I of Petitioner's Brief in support of its petition for certiorari, reads: "The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court. R. (4)."

We think we have conclusively demonstrated at pages 30 to 38 of this brief under our Point V that the mandatory "complete and self-executing statutory exclusion of all other courts".(quoted from the opinion of this court in *Kalb v.*

---

[2] It is probably not wide of the mark to suggest that the mortgagee-purchaser insisted upon a dismissal of the farmer debtor proceedings from the Bankruptcy Court at the particular time when it did because it knew that the reassertion of the bankruptcy power was imminent. Some observations upon this subect have been made in Note 1 which appears at pages 9 to 11 of the Brief of the Respondent filed herein on the petition for Writ of Certiorari. The references in that note to pages of the Record are to the original Record as presented from the Court of Appeals. The same page numbers now appear in the present Record as folio numbers.

Feuerstein; decided January 2, 1940) in Section 75 (n), (o) and (p) precluded the District Court from modifying the effect thereof **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."** (quoted from Section 75 (o)).

Petitioner's "Argument II" in Its Brief in Support of Its Petition for Certiorari, Page 20.

Argument II of Petitioner's Brief reads: "The order of the District Court modifying the restraining order and permitting the sale, not excepted and not appealed from, became res judicata and binding upon the respondent."

First Answer: The order of the District Court was void, no appeal was necessary. Point V of this brief, presented at pages 30 to 38 herein, we think fully answers the petitioner's Argument II.

Second Answer: No appeal was possible. The order was issued ex parte "upon the oral application" of the mortgagee without notice or knowledge of its issuance. The debtor did not have his day in court. He was not accorded due process of law. See this brief, Point VI, at pages 38 to 41 and under Point II at pages 22 and 23 under the heading, "Lack of Due Process, No Notice."

We will here consider the cases cited by the petitioner under its Argument II.

McWilliams v. Blackard, 96 Fed. (2d) 43, C. C. A. 8, (1938), cited on page 20 of petitioner's brief. Every procedure in the McWilliams case occurred **after** the present subsection (s) was enacted. The Circuit Court of Appeals held the present subsection (s) to be unconstitutional and directed dismissal of the proceedings. Thereafter this Court held it to be constitutional. Upon these facts the District Court reinstated the amended petition relying upon para-

graph (5) (as it then was) of the present subsection (s), which read: "... all cases that have been dismissed ... because of the Supreme Court's decision holding the **former** subsection (s) unconstitutional, shall be promptly reinstated. The Circuit Court reversed the District Court for the reason that the clause just quoted referred not to cases dismissed under the **present** subsection (s) but to the "**former** subsection (s)." No question of state or federal jurisdiction or power was involved. No State Court was involved. No question of conflict of jurisdiction was in the case. The Federal Courts had power and jurisdiction and only the Federal Courts acted.

Minneman v. Federal Land Bank, 105 Fed. (2d) 363, cited on page 21 of petitioner's brief.

The petitioner again fails to distinguish between the decision or act of a **court having power** and the decision or act of a **court without power.** The District Court in the present Byerly case had no power to authorize the State Court to sell. The State Court had no power to sell and therefore Mr. Byerly's propertyrights were never divested. In the *Minneman* case as in the *McWilliams* case the Federal Courts declared the Act unconstitutional and had power to do so. *Chicot v. Baxter*, — U. S. —, 60 S. Ct. 317, 320, top of second column. There was no appeal and the decision was final for that case.

The Court said in the Minneman opinion: "The courts early distinguished between the effect of void and voidable orders." At the close of the opinion it said: "Since we hold that there were no proceedings pending to be reinstated upon amendment of Section 75 (s), it is unnecessary for us to discuss this proposition. The final order was res judicata.

Petitioner's "Argument III" in Its Brief in Support of Its Petition for Certiorari, Page 23.

Argument III of Petitioner's Brief reads: "Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s) followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objcting to such irrgularities."

We think that the petitioner's Argument III entirely misconceives the nature of Section 75. The respondent did not abandon his proceedings under Section 75 (a) to (r). He fully completed them and amended his petition according to statutory procedure. The proceedings under Section 75 (a) to (r) were terminated by the provisions of the law itself. There was nothing to abandon or to dismiss. The proceedings were not nugatory—they had fulfilled their purpose of affording to the farmer-debtor an opportunity to seek a composition or extension.

The act of the District Court in presuming to authorize the State Court to sell in foreclosure, contrary to Section 75 (n), (o) and (p), was not a mere "irregularity", it was a "nullity" because the court had no power to do it and therefore the sale was a "nullity" also.

As to the claim of the petitioner that the order of dismissal was "upon application of the debtor." He made no such application despite the recital in the order of dismissal. The misrepresentation of the petitioner upon which it was based and the finding of the court below upon the subject are referred to in Note 2 at page 50 of this brief.

Harrison v. Remington, 140 Fed. 385; *Viviano v. Ferguson*, 39 S. W. (2d) 568; and *Piukkula v. Pillsbury*, 42 P. (2d) 921, cited at page 24 of the petitioner's brief are likewise wholly inapplicable. They refer to the general law while we are here concerned with a specific statutory provision under a specific constitutional grant of power. Nothing has occurred in Mr. Byerly's case to render any part of the provisions of Section 75 (a) to (r) ineffective as to the proceedings thereunder. He filed his petition under Section 75 (a) to (r) and thereby brought Section 75 (n), (o) and (p) into effect. Neither a party, nor a court, may dismiss a proceeding that has fully run its course and terminated.

Petitioner's "Argument IV" in Its Brief in Support of Its Petition for Certiorari, Page 25.

Argument IV of Petitioner's Brief reads: "The so-called sale in the State Court did not change the legal status of the debtor or his property as he still retained the identical right of redemption secured to him by the provisions of Ohio G. C. Section 11690 up to the time of confirmation by the State Court which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings."

1. We must agree that "the so-called sale in the State Court did not change the legal status of the debtor or his property," because we think, as a legal proposition, it was an utterly void gesture. We have discussed this subject under Point IV of this brief beginning at page 29.

2. But as a practical matter it has been of momentus significance to the respondent because as a direct result of it he has been put off of his farm and lost the use of it for nearly five years while the petitioner has appropriated the use and occupation of it.

3. However if we take it as no doubt the petitioner wishes to be understood, we must say that the law of Ohio requires a foreclosure sale to be advertised for **five successive weeks** over a period of **thirty days** before the date of sale. (The state statutes, G. C. 11681 and 11682, are shown at page 7 of this brief.) The petitioner procured the State Court to confirm the viod sale **within less than thirty days from the day it procured the order of dismissal from the District Court.** Before thirty days had elapsed the same District Court had reinstated the case. The dismissal, August 26, 1935. R. 8. State Court Confirmation of Sale, September 10, 1935. R. 12, paragraph 1. Reinstatement, September 24, 1935, R. 11, which was **twenty-nine days** after the dismissal. Therefore if the petitioner had not had the attempted sale to depend upon, it could not have secured a decree of confirmation before reinstatement because sufficient time had not elapsed to conduct a sale.

Petitioner's "Argument V" in Its Brief in Support of Petitioner's Petition for Certiorari, Page 27.

Argument V of Petitioner's Brief reads: "The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceeding."

We are of the opinion that the State Court had no power to decree confirmation of the void sale. This has been discusesd in Point VII of our Argument at pages 41 to 48 of this brief.

We have very grave doubts as to whether the State Court had jurisdiction of the property when it decreed confirmation of the void sheriff's sale. We think, as explained under Point VIII at pages 48 to 50 of this brief that the bankruptcy power of the United States had been

reasserted over the property before the decree of confirmation was issued by the State Court.

The decisions cited by Petitioner under the heading of Argument V, pages 28 to 35, will be here examined.

Robertson v. Howard, 229 U. S. 254, cited at page 28 of Petitioner's Brief. This case originated in a bankruptcy court where a referee confirmed a sale of real estate in bankruptcy. Section 75 was not involved. The Supreme Court of Kansas held the sale to be void because the **general federal statutes** prescribing sale procedure had not been observed. This Court reversed the Kansas Supreme Court for the reason that **sales in bankruptcy courts are regulated by the bankruptcy law which gave the referee discretionary power as to the conduct of sales.** The referee had full power.

Thompson v. Tolmie, 2 Pet. 157 (27 U.S. 157), cited at pg. 29 of Petitioner's Brief. We deem it sufficient to suggest that in this case this court discussed the general rule governing collateral attack in two classes of situations. First, where a court **had power.** Second, where it **had no power.** In this case the court **had power**—and this court applied the rule. In *Gantleff v. Ewing*, 44 U. S. (3 How.) 707, nine years later (discussed at page 20 of this brief) the court **had no power**—and this court applied the rule.

Hall v. Law, 102 U. S. 461, cited at page 29 of Petitioner's brief, presents the same principle where the court **had power** and this court applied the general rule.

Briscoe v. Rudolph, 221 U. S. 547, cited at page 29 of Petitioner's Brief, was another case where the court **had power** and this court applied the rule.

Grubb v. Public Utilities, 281 U. S. 470, cited at page 30 of Petitioner's Brief. In the State Court (119 Ohio State

Reports 264), an application for an interstate motorbus certificate was denied because a "loop route" from Portsmouth, Ohio, across the river to the Kentucky side and return was held to be only colorable for the purpose of claiming interstate business. An original suit was brought in the United States Court and appealed to this Court. The only federal question involved was whether the commerce clause committed to Federal Courts **exclusive jurisdiction** of all suits relating to regulation of interstate commerce. The Court said (bottom of page 475): "This view of that clause is quite inadmissable. It has no support in any quarter and is at variance with the actual practice in this class of litigation." The court held that the state and federal courts have concurrent jurisdiction. The State Court **had power.**

Southern Pacific v. United States, 168 U. S. 1, cited at page 31 of Petitioner's Brief is another instance where the court **had power** and this court applied the rule.

Mitchell v. First National Bank, 180 U. S. 477, cited at page 31 of Petitioner's Brief, followed the decision in the preceding Southern Pacific case because in it also the court **had power.**

Pepper v. Litton, — U. S. —; 60 S. Ct. 238, (decided by this court December 4, 1939), cited at page 31 of Petitioner's Brief, reversed the Court of Appeals for the Fourth Circuit and held that a bankruptcy court may determine the validity of a claim reduced to judgment in a State Court. Under its bankruptcy power a court of bankruptcy may go behind that judgment and examine the claim sued on. In the Court below the petitioner here relied upon the Fourth Circuit decision before its reversal.

Prehjl v. Prudential, 98 Fed. (2d) 199, cited at page 32 of Petitioner's Brief **did not involve Section 75** but the

Bankruptcy Law of 1898. The sole question was whether a mortgage lien, placed upon real estate six years before the mortgagor was adjudged a bankrupt was discharged by the discharge of the bankrupt. Now the general bankrupsy law does not discharge liens which have attached more than four months preceding bankruptcy. (Section 67.) The opinion states that "On proper application an order was entered in the bankruptcy court authorizing the mortgagee to foreclose its mortgage." While the foreclosure was proceeding in the State Court the bankrupt in due course received his discharge. He then went into the State Court and opposed confirmation of the foreclosure sale on the ground that his discharge in bankruptcy also discharged the lien on the real estate that was being foreclosed. When the State Court decided against him he raised the same question in the Federal Court. In its decision the Federal Court said although it had no doubt of the correctness of the decision of the State Court, yet it would put its decision upon the ground that the issue was conclusively settled in the State Court and could not be retried in the Federal Court. The decision followed the rule that as the **State Court had exclusive jurisdiction** of the subject matter and of the person, its judgment could not be collaterally assailed in any other court. The State Court **had power.**

Montgomery v. Equitable, 83 Fed. (2d) 758, cited at page 32 of Petitioner's Brief, was another instance of complete **power** in a court to render a judgment.

In re 7000 South Shore, 86 Fed. (2d) 499, cited at page 33 of Petitioner's Brief, involved Section 77B of the Bankruptcy Act for the rehabilitation of corporations. In 1930, **four years before Section 77B was enacted,** a foreclosure suit had been filed and a receiver appointed in a State Court. Also before Section 77B was enacted the State

Court allowed the account of the receiver. Thereafter the 77B proceedings were filed in the Federal Court. The Federal Court of Appeals held that "the State Court had jurisdiction of the parties and the subject matter" and that "the subject matter and the parties being before the court and the issue submitted on proper pleadings, we may not enquire as to the wisdom of the order." The State Court had exclusive **power** and rendered final judgment long before Section 77B was enacted.

Rishol v. McPherson, 34 Fed. (2d) 250, cited on page 33 of Petitioner's brief; *Jack v. Hood*, 39 Fed. (2d) 594, cited on page 34; *Gordon v. Ware*, 132 Fed. 444, also cited on page 34, and *Wright v. Schick*, 134 Ohio State, 193, also cited on page 34 of the Petitioner's Brief, are all instances of complete **power** in a court to render a final decision.

In concluding the discussion of this Point V of the Petitioner's Argument, may it be suggested that no instance will be found in United States federal jurisprudence where a Federal Court is precluded by a judgment of a State Court from adjudicating a question arising out of **exclusive federal jurisdiction.** *Wright v. Union Central*, 304 U. S. 502, and *Kalb v. Feuerstein*, — U. S. —, (decided January 2, 1940, by this court) clearly illustrate this statement.

Petitioner's "Argument VI" in Its Brief in Support of Its Petition for Certiorari, Page 36.

Argument VI of Petitioner's Brief reads: "The case of *Lloyd v. The Citizens Bank of Albany Company*, 89 Fed. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48) is clearly distinguishable upon its facts."

We submit there is no substantial difference between the *Hoyd* case, discussed at page 27 of this brief, and that of *Byerly v. Union Joint Stock Land Bank*, 106 Fed. (2d) 576, which is the subject of the pending petition for certiorari.

1. It seems that the petitioner asserts that an entire violation of Section 75 (o) should be reversed while a little violation of it should be commended and affirmed. Section 75 (o) reads: ". . . the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition . . .; Proceedings for foreclosure of a mortgage on land . . .; Proceedings by way of execution . . .; Proceedings to sell land under or in satisfaction of any judgment . . .; sale or other proceedings under . . . any . . . mortgage." **This statute is inclusive, mandatory, and self-executing.** It contains the sole authority for the modification of its provisions "upon petition made to and granted by the judge after hearing and report by the conciliation commissioner." (Set forth in full at page 4 of this brief.)

2. Mr. Byerly, the farmer debtor had no opportunity to prosecute error to the order of the District Court modifying the effect of Section 75. (o). He did not learn of it until ten months after it was issued. Even if the order had been within the power of the District Court to issue, it was issued without due process of law as has been suggested under Point VI at pages 38 to 41 of this brief.

But no error proceeding was required. This court said in its decision of January 2, 1940, in *Kalb v. Feuerstein* at the bottom of page 7 of the court's printed decision:

"Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over Bankruptcy has been exercised as in this Act."

3. The nullity of the sheriff's sale results from Section 75 (n), (o) and (p). **Being a nullity, the State Court had no power to confirm it.** As this court said in *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (discussed at page 20 of this brief): **"No court ,however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law."**

Mr. Byerly's real estate title was never divested by the State Court. He still has his right of redemption and he and it are subject to the federal jurisdiction under Section 75.

4. The petitioner misconceives the question which is —not whether the State Court had jurisdiction when it presumed to confirm a nullity (the void sheriff's sale) but— whether that confirmation divested Mr. Byerly of his real estate. The State Court could not confirm a sale that never was held. **"No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law."** An attempt to do so is *coram non judice* and will be given no recognition by any court except to disregard it.

CONCLUSION

We suggest that the judgment of the Circuit Court of Appeals for the Sixth Circuit is not only correct but in conformity with the decisions of all Federal Courts which have considered the issue.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio.
WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent.

FILE COPY

MAY 17 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

PETITION FOR REHEARING
BRIEF IN SUPPORT

ELMER McCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent Carl Byerly.

Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

PETITION FOR REHEARING
BRIEF IN SUPPORT

ELMER MCCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent Carl Byerly.

TABLE OF CASES

A — Page

Adair v. Bank, 303 U.S. 350 ..... 6, 7, 12

B

Bernards v. Johnson, 103 Fed. (2d) 567 8
Bradford v. Fahey, 76 Fed. (2d) 628 8
Brown, In re, 21 Fed. Supp. 935 9
Byerly v. Union Joint Stock Land Bank of Detroit, 106 Fed. (2d) 576 8

C

Caldwell v. Texas, 141 U.S. 209 1
City v. Holmes, 125 U.S. 694 1
Conciliation commissioner, In re, 24 ABR NS 245; 5 Fed. Supp. 131 15
Cope, In re, 8 Fed. Supp. 961 8
Cresap, In re, 99 Fed. (2d) 722 8

D

Duffy, In re, 9 Fed. Supp. 166 8

E

Eaves v. Glenn, 9 Fed. Supp. 647 8

F

First National Bank v. Beach, 301 U.S. 435 ..... 6, 13
Freudenberg, In re, paragraph 3060 Bankruptcy Law Service, District Court, Wisconsin 9

G

Gila v. Gila, 205 U.S. 279 1
Gray v. Union Joint Stock Land Bank, 308 U.S. 523 6
Greaves, In re, 37 ABR NS 461 9

H

Helm, In re, Bankruptcy Law Service, paragraph 51339, District Court, Mississippi 9
Home v. New York, 122 U.S. 636 1
Houser, In re, 9 Fed. Supp. 891 8
Hoyd v. Citizens Bank, 89 Fed. (2d) 105 8

I

Page

In re, see name of party

J

John Hancock v. Bartels, 308 U.S. 180 ..... 6, 11
Johnson v. United States, 163 Fed. 30 11
Johnson v. Zerbst, 304 U.S. 458 12

K

Kalb v. Feuerstein, 308 U.S. 433 ..... 6, 7, 12
Kalina, In re, 9 Fed. Supp. 170 8
Keifer v. Reconstruction, etc., 306 U.S. 381 11
Kline v. Burke, 260 U.S. 226, 234 9

M

Moore v. Dempsey, 261 U.S. 86 12
Morrison v. Federal Land Bank, 308 U.S. 524 6

N

Naylor v. Cantley, 96 Fed. (2d) 761 8
Newman, In re, 2 Fed. Supp. 427 9

O

O'Brien, In re, 28 Fed. Supp. 715 ..... 8, 9
Osterritter, In re, 23 ABR NS 332; 3 Fed. Supp. 674 15

P

Paine v. Capital, 8 Fed. Supp. 500 8
Pollock v. Farmers, 158 U.S. 601 1
Price, In re, 99 Fed. (2d) 691 8
Price, In re, 16 Fed. Supp. 836 9

R

Rank, In re, 9 Fed. Supp. 171 8

S

Shadley v. Ludwig, 106 Fed. (2d) 745 8
Vallely v. Northern, 254 U.S. 348, 353 10

W

Wilcons v. Penn Mutual, 91 Fed. (2d) 417 8
Williams v. Conger, 131 U.S. 390 1
Wogstad, In re, 10 Fed. Supp. 349 8
Wright v. Union Central, 304 U.S. 502 6
Wright v. Vinton, 300 U.S. 440 ..... 6, 14

TABLE OF STATUTES

	Page
Bankruptcy Act	
Section 25	20
Section 75	15, 17
Subsections (a) to (r)	12, 15, 19, 20
Subsection (i)	12
Subsection (n)	5
Subsection (o)	2, 3, 4, 5, 7, 13, 18, 19
Subsection (q)	15
Subsection (r)	14
Subsection (s)	12; 15
Subsection (s) (3)	15
Constitution of the United States	
Article VI	4
Constitution of the State of Ohio	
Article XV, Section 7	5
Judicial Code, Section 9, U.S.C. Title 28, Section 13	3
Judicial Code, Section 266, U.S.C. Title 28, Section 381	3

TABLE OF AUTHORITIES

Hearings before Temporary National Economic Committee	16
Senate Report No. 985, 74th Congress, 1st Session	17
Senate Report No. 1045	17
House Report No. 1808, page 2	17

RULES

Rules in Equity	
Rule 1	3
Rule 4	3
Rules of Civil Procedure	
Rule 65	3
Rule 77	3

Supreme Court of the United States

October Term 1939
No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

PETITION FOR REHEARING

Note: All emphasis in this Petition and in the Brief which follows it is supplied.

To the Honorable, The Justices of the Supreme Court of the United States:

The respondent respectfully presents his petition for a rehearing and submits the following reasons, supported by his brief, why his prayer should be granted:

I

In the decision herein there exists a division of opinion upon an important point of profound importance to the greatest industry of the nation in which more persons are engaged and more property involved than in any other. It affects the administration of a settled policy of dealing with the difficult problems of agricultural indebtedness. Under similar circumstances, involving fewer persons and less property rehearings have been granted by this Court. *Home v. New York*, 122 U.S. 636; 134 U.S. 594; 119 U.S. 129. *Pollock v. Farmers*, 158 U.S. 601; 157 U.S. 429. *City v. Holmes*, 125 U.S. 694. *Caldwell v. Texas*, 141 U.S. 209. *Williams v. Conger*, 131 U.S. 390. *Gila v. Gila*, 205 U.S. 279.

II

The question in this case is whether the respondent was divested of his real estate by the sale in state foreclosure proceedings which was conducted by authority of the bankruptcy court in violation of Section 75 (o) of the Act of March 3, 1933, and later confirmed by the state court after the proceedings under Section 75 had been dismissed. The Court, three Justices dissenting in a separate opinion, held that he was so divested.

III

The Court in its majority opinion held that "it was error for the District Court, in the absence of the preliminary steps required by this subsection, to permit the sheriff to hold the sale", but that the "Error committed by it . . . could have been corrected by appeal from its order". The farmer debtor had no opportunity to appeal from the erroneous ex parte order of the bankruptcy court because it was unknown to him. When it was disclosed to him he acted promptly.

The Record, at the bottom of page 4, sets out this ex parte order of the bankruptcy court which is unanimously agreed to have been erroneous.

The Record at pages 9 and 10 shows that this erroneous ex parte order remained unknown to the farmer debtor, the respondent here, for more than nine months. He did not discover it until after the foreclosure sale had been confirmed and a deed had been delivered to the mortgage holder, who is the petitioner here, and recorded. He promptly applied to the bankruptcy court for redress during the same week he discovered that the erroneous order had been issued and that his farm had been sold in foreclosure. See his Application for Reinstatement at Record pages 9 and 10.

IV

Not only was the order purporting to permit the sale issued in violation of the special statute, Section 75 (o), but the general procedural statutes, outside of bankruptcy law, and the Rules in Equity were violated.

Section 9 of the Judicial Code provides that: "The District Courts . . . as courts of equity, shall be deemed always open for the purpose of filing any pleadings, . . . of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, **upon reasonable notice to the parties,** make, direct, and award . . . all such . . . orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. U.S.C. Title 28, Section 13. This statutory provision was carried into Equity Rules 1 and 4.

Equity Rule 4, reads: **"Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties** or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor, and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order."

Section 266 of the Judicial Code designated to apply where a temporary restraining order has been granted, requires that before it is disolved, or modified two days notice must be given to the party who obtained it. U.S.C. Title 28, Section 381.

Both the statute and the Equity Rules have been car-

ried into the present Rules of Civil Procedure in Rules 65 and 77.

We mention these references to the Judicial Code, the Equity Rules, and the Rules of Civil Procedure, to show that throughout federal jurisprudence generally, as distinct from bankruptcy law and farmer debtor proceedings, the requirement of due notice in matters of injunction or their modification is carefully preserved.

V

We most respectfully urge that Section 75 (o) in all its force is a clear mandatory prohibition **directed to the state court,** as much as to the bankruptcy court. In fact **the interdiction of Section 75 (o) is directed more intimately to the state court than to the federal court.** It reads: "the following proceedings . . . **shall** not be maintained, **in ANY court or OTHERWISE.**" These "proceedings" (foreclosure) could **never** be pending in the bankruptcy court; they are **always** pending in another court usually the state court. There is no exception, qualification or escape from Section 75 (o), except through the means prescribed in Section 75 (o) itself, whereby a pending foreclosure action may be maintained. Under Article VI of the Constitution Section 75 (o) is the Supreme Law of the Land. It is binding upon federal judges **and upon state judges and sheriffs.** Before the judge and the sheriff of the state court could take office each was required by the same Article VI of the Constitution to be bound by oath to support the Constitution of the United States. "This Constitution, and the Laws of the United States which are made in pursuance thereof; . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, . . . and all executive and judicial Officers . . . of the several States, shall be bound

by Oath . . . to support this Constitution; . . ." Constitution of the United States, Article VI.

The judge and the sheriff were also required by the Constitution of the State of Ohio to take oath to support the Constitution of the United States before assuming their respective offices: "Every person chosen or appointed to any office under this State, before entering upon the discharge of its duties, shall take an oath to support the Constitution of the United States . . . " Constitution of the State of Ohio, Article XV, Section 7.

We suggest that in addition to its own imperative words the significance of Section 75 (o) is augmented by the fact that it was created and inserted in addition to Section 75 (n) which subjects the farmer and his property to the **exclusive jurisdiction** of the bankruptcy court. If the bankruptcy court, the sheriff and the state court may unlawfully render Section 75 (o) ineffective, there remains little practical distinction between Section 75 (o) and Section 75 (n). To put it another way, Section 75 (o) has then been judicially repealed.

We must most earnestly urge that in our opinion the state court and its officer, the sheriff, were not entitled to rely upon the unlawful order of the district court purporting to grant permission to make the sale. **The mandatory terms of Section 75 (o) were expressly binding upon the state court and sheriff no less than they were binding upon the federal District Court.** The state court and sheriff were not justified in unlawfully attempting to conduct a sale by the mere reason that the federal district judge had unlawfully invited them to disregard Section 75 (o). They were not absolved from their constitutional oaths to obey the Supreme Law of the Land because the federal court had unlawfully disregarded it.

We agree that the federal district court did not lose jurisdiction by erroneously construing or applying the statute. This court has repeatedly and uniformly held that a bankruptcy court may not divest itself of its jurisdiction. We agree that the place to attack the unlawful order of the federal district court was in the federal courts and this the respondent has consistently and persistently done from the week he first learned that the federal district court had unlawfully acted.

VI

The effect of this decision, if permitted to stand, will in a large measure nullify the national legislation upon the subject of relief of farmer debtors which was initiated by the Act of March 3, 1933, and which has been developed and perfected by many decisions and amendments. The last amendment was the Act of March 4, 1940, which continued its provisions until March 3, 1944. This legislation has been clarified and enforced for its practical use by the following unanimous decisions of this Court:

Wright v. Vinton, 300 U.S. 440; (1937);
First National Bank v. Beach, 301 U.S. 435. (1937);
Adair v. Bank, 303 U.S. 350 (1938);
Wright v. Union Central, 304 U.S. 502, (1938);
John Hancock v. Bartels, 308 U.S. 180, (1939);
Gray v. Union Joint Stock Land Bank, 308 U.S. 523, (1939);
Morrison v. Federal Land Bank, 308 U.S. 524, (1939);
Kalb v. Feuerstein, 308 U.S. 433, (1940).

VII

Section 75 (o) is the buttress of the Act, and was designed to protect the negotiations between the farmer

debtor and his creditors from the strain and turmoil of foreclosure litigation. There can be no true negotiation in an atmosphere where contemporaneous litigation is possible. It is as important to individual creditors as to the farmer debtor that the status quo should be maintained for all alike. This part of Section 75 has never been amended.

The decision would permit a mortgage holder, as in this case, to obtain an unlawful ex parte authorization of a foreclosure sale in violation of Section 75 (o) and at an opportune moment divest the title of the farmer debtor providing it may be kept secret from him until it is confirmed at some time when the State Court has regained its jurisdiction. Section 75 (o) by its express terms is operative only during negotiations for composition or extension, that is until the "disposition of the composition or extension proposal by the court."

Such a situation will inevitably bring reproach upon the administration of a law which has been held by this court and by the lower courts to be self-executing and mandatory in every reported decision that has considered it. We cite these decisions:

Decisions of This Court

1. *Adair v. Bank*, 303 U.S. 350 (1938) at page 355: "To accomplish its purpose Section 75 provides that the filing of a petition shall effect a stay."

2. *Kalb v. Feuerstein*, 308 U.S. 433 (1940), Preliminary Print, at page 440: " . . . Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent **after hearing** of the bankruptcy court . . . "

Decisions of Circuit Courts of Appeals

3. *Bradford v. Fahey*, 76 Fed. (2d) 628 (1935) CCA 4.
4. *In re O'Brien*, 78 Fed. (2d) 715 (1935) CCA 2.
5. *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105. (1937) CCA 6.
6. *Wilcons v. Penn Mutual*, 91 Fed. (2d) 417 (1937) CCA 10.
7. *In re Cresap*, 99 Fed. (2d) 722. (1938) CCA 7.
8. *Naylor v. Cantley*, 96 Fed. (2d) 761. (1938) CCA 8.
9. *In re Price*, 99 Fed. (2d) 691 (1938) CCA 7.
10. *Bernards v. Johnson*, 103 Fed. (2d) 567 (1939) CCA 9.
11. *Byerly v. Union Joint Stock Land Bank of Detroit*, 106 Fed. (2d) 576. (1939) CCA 6.
12. *Shadley v. Ludwig*, 106 Fed. (2d) 745 (1939) CCA 6.

Decisions of District Courts

13. *In re Freudenberg*, paragraph 3060 Bankruptcy Law Service, (1934). District Court, Wisconsin.
14. *Eaves v. Glenn*, 9 Fed. Supp. 647, (1934) District Court, Texas.
15. *Paine v. Capital*, 8 Fed. Supp. 500 (1934) District Court, Texas.
16. *In re Kalina*, 9 Fed. Supp. 170 (1934) District Court, Nebraska.
17. *In re Rank*, 9 Fed. Supp. 171 (1934) District Court, Nebraska.
18. *In re Duffy*, 9 Fed. Supp. 166 (1934) District Court, Iowa.
19. *In re Cope*, 8 Fed. Supp. 961. (1935) District Court, Colorado.
20. *In re Houser*, 9 Fed. Supp. 891 (1935) District Court, Illinois.
21. *In re Wogstad*, 10 Fed. Supp. 349 (1935) District Court, Wyoming.

22. *In re O'Brien*, 28 Fed. Supp. 715 (1935) District Court, New York.
23. *In re Newman*, 2 Fed. Supp. 427 (1935). District Court, Minnesota.
24. *In re Price*, 16 Fed. Supp. 836. (1936) District Court, Louisiana.
25. *In re Greaves*, 37 ABR NS 461 (1937) District Court, Mississippi.
26. *In re Brown*, 21 Fed. Supp. 935 (1938) District Court, Iowa.
27. *In re Helm*, Bankruptcy Law Service, paragraph 51339. (1938) District Court, Connecticut.

We believe that another instance of such uniform agreement upon the effect of a federal statute will not be found in American jurisprudence.

VIII

It is most respectfully urged that the District Courts are entirely creatures of the Congress. Congress alone has the sole constitutional power to give jurisdiction and to delineate exactly the limits and conditions of that jurisdiction. A District Court has such jurisdiction and only such jurisdiction as is given by statute. When a district court exceeds its authority, its act is coram non judice. The Congress did not enact Section 75 (o) with an implied understanding that the district court might utterly disregard it and proceed as the district judge though Congress should have enacted it. There is within Section 75 (o) no power whereby a district judge may exercise a discretion to modify its mandatory language. Mr. Justice Sutherland, speaking for the entire court, said in *Kline v. Burke*, 260 U.S. 226, at page 234: "Only the jurisdiction of the Supreme Court is derived from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at

its discretion, provided it is not beyond the boundaries fixed by the Constitution." In *Vallely v. Northern*, 254 U.S. 348, at page 353, Mr. Justice McKenna said for the whole Court: "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities." And at page 356: "For a court to extend the [bankruptcy] Act to corporations of either kind is to enact a law, not to execute one." In that case the insurance corporation had fully participated in the bankruptcy proceedings and its estate had been substantially administered before it filed a motion to rescind its adjudication. Section 75 (o) is no less mandatory and explicit than Section 4 (b) which was considered in *Vallely v. Northern* and here Mr. Byerly had no part in the ex parte unlawful order of the District Court. He was ignorant of it.

IX

Counsel for the respondent respectfully submits in further support of this petition the brief which follows.

Wherefore the respondent respectfully prays that his petition for rehearing be granted and that upon further consideration the judgment of the Circuit Court of Appeals for the Sixth Circuit be affirmed.

May 9, 1940.

Elmer McClain,
Lima, Ohio,
William Lemke,
Fargo, North Dakota,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

As one of counsel for the respondent I certify that the within petition for rehearing and the brief in support of it are presented in good faith and not for delay.

Elmer McClain,
One of Counsel for
Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

We earnestly suggest that the decision, if permitted to stand, will introduce a discordant note into the administration of farmer debtor proceedings. It will render complicated and indefinite a statute which various acts of Congress and the several unanimous decisions of this Court have made simple and certain for both debtor and creditor.

Section 75 as it now appears in the statutes is the result of numerous amendments intended to insure that the national policy relating to agricultural indebtedness shall be clearly understood and certainly enforced. This Court in its eight unanimous decisions involving Section 75 which are cited under Heading VI of the foregoing Petition for Rehearing has meticulously adhered to the national legislative policy as expressed by the terms of the statute.

Very recently this Court in *Keifer v. Reconstruction*, etc., 306 U.S. 381, at page 390, referred to "a definite attitude on the part of Congress which should be given hospitable scope." That decision in its Note 4, besides citing several decisions of this Court and other authorities, quoted a decision by Mr. Justice Holmes while on Circuit in *Johnson v. United States*, 163 Fed. 30, where he said: "The legislature has the power to decide what the policy of the law shall be and if it has intimated its will, however, indirectly, that will should be recognized and obeyed."

The two opinions of this Court upon Section 75 preceding this one gave unanimous utterance to the following expressions relating to the legislative policy:

In *John Hancock v. Bartels*, 308 U.S. 180, Preliminary Print, the Chief Justice said for the Court at page 183: "We think that the District Judge failed to

follow the mandate of the statute . . .". At pages 184 and 185: "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them a chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s)." At page 185, referring to the words "good faith" in Section 75 (i): "That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct." At the bottom of page 187, the opinion states that the Court is concerned "merely with the duty to follow the procedure which the statute defines and the District Court failed to observe."

In *Kalb v. Feuerstein*, 308 U.S. 433, Preliminary Print, Mr. Justice Black said for the Court at the top of page 440: "We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending." In Note 12 on the same page: "That a state court before which a proceeding is competently initiated may—by operation of supreme federal law—lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system. See *Moore v. Dempsey*, 261 U.S. 86. Cf. *Johnson v. Zerbst*, 304 U.S. 458". At the top of page 443 of the Kalb decision the opinion continues: "Congress set up in the Act an exclusive and easily accessible statutory means for rehabilitating distressed farmers who, as victims of a general economic depression, were without means to engage in formal

court litigation." Again on page 443 at the end of the first paragraph: "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts." Also at page 444: "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor. The protection of the farmers was left to the farmers themselves or to the commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

Prior opinions of this Court have been in the same vein. In *Adair v. Bank*, 303 U.S. 350, at the bottom of page 355, it was said by Mr. Justice Reed for the Court: "To accomplish its purpose, Section 75 provides that the filing of a petition shall effect a stay". Note 5 appended to this statement is a quotation in full of Section 75 (o).

In *First National Bank v. Beach*, 301 U.S. 435, Mr. Beach, a merchant, suffered reverses and retired early in the depression to his family homestead of 192 acres which was subject to a mortgage of $100,000. He resided on 42 acres and rented out the rest. He had 200 chickens at first, but only 50 later; 3 sheep; 1 horse; and some old farm tools. Out of his $4000 income $1500 was from non-farm property, $2200 was from farm rentals and only the bal-

ance of $300 was from his farm work. In discussing the statutory definition of a farmer in Section 75 (r) the opinion, by Mr. Justice Roberts at the bottom of page 438 says: "Occasions must have been in view when the receipt of income derived from farming operations would make a farmer out of some one who personally or primarily was engaged in different activities." . . . "We refuse to be led away from the limitations of the concrete case". At the lower half of page 439: "True, the money returns were scanty. . . . The scantiness of the yield may have turned him into a bankrupt, but it did not change his occupation". At the bottom of page 440: "We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting."

In *Wright v. Vinton*, 300 U.S. 440, which was the first decision of this Court upon this statute, it was said by Mr. Justice Brandeis for the Court, at pages 463 and 464: "Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional Committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with the provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent."

Examination of the Acts of Congress relating to farmer debtor proceedings which were initiated with the Act of March 3, 1933, and have continued to that of March 4, 1940, discloses a progressive and persistent legislative intent to secure the administration of a definite policy. That policy, which was entitled in the first Act "Provisions for the Relief of Debtors", is that with a minimum of procedural complications, indeed **without assistance of counsel** (see Section 75 (q)) a farmer debtor shall be permitted within the exclusive jurisdiction of the bankruptcy court—which court is **prohibited from surrendering its jurisdiction**—to have three opportunities to save his farm from foreclosure. The **first** is by direct negotiation with his creditors and with the approval of the court (Section 75 (a) to (r)) and, failing that, **second** by giving him more than three years to accumulate means to refinance his secured debt at the value of the security (Section 75 (s)) and, failing that, **third** by having opportunity to redeem his farm from final public sale (75 (s) (3)).

This was a new advance in the progressive exercise of the bankruptcy power expressly granted in the Constitution. It was natural that such a novel departure from established bankruptcy tradition, under which a petitioner theretofore had always been promptly and completely divested of his property, should be coldly received by some of the two hundred and odd judges of the federal courts. It was. The first reported decision, *In re Osterritter*, 23 ABR NS 332; 3 Fed. Supp. 674, (1933), deprived the farmer debtor who had filed a petition under Section 75 of an extension of a secured debt against his exempted real property. The second, *In re Conciliation Commissioner*, 24 ABR NS 245; 5 Fed. Supp. 131, observed that the object of the law "is outside of bankruptcy to coerce creditors to enter into new contracts".

After the general policy of the law had been accepted all sorts of loop holes were discovered by interpretation which would sidestep the declared policy. This process was accentuated by the fact that large corporate interests held many mortgages in every part of the nation whereas farm mortgagors usually were holders of small units and were financially embarrassed. An interpretation which was suggested and rejected in one case could be repeatedly offered in another until finally adopted. Usually the farmer debtor, often without counsel, was unable to present properly his case against a mortgage holder who was a participant in a concercerted and continuous attack against the law. All this was suspected, and Congress frequently acted to counteract the results. It was not until June 13, 1939, that the manager of the Association of Life Insurance Presidents testified before the Temporary National Economic Committee that the Association in a single year spent $60,000.00 for attorney fees and $3579.28 for expenses in litigation to defeat farmer debtor legislation. These sums were expended by the Association in a single suit in one court despite the fact that no Life Insurance Company was a party. Neither it nor any Life Insurance Company appeared as amicus curiae, or otherwise. The litigant aided was a Joint Stock Land Bank mortgage holder. See Part 10, Life Insurance Hearings before the Temporary National Economic Committee, 76th Congress, First Session, pages 4345-4346, 4352-4354; 4355; 4750.

This policy, which was originally recommended by a Republican President and first expressed in legislation in 1933, has been steadfastly maintained by a Democratic Administration through the varying political complexions of five Congresses, the Seventy-Second to the Seventy-Sixth inclusive.

Repeatedly Congressional Committees and members of the House and Senate have declared that the courts failed to recognize and obey the policy intended to be administered under Section 75. Many amendments were enacted to rectify what the Congress deemed to be misinterpretations of its **original intention.**

For instance, Senate Report No. 985, 74th Congress, First Session, at page 2 declared that:

> "Obviously, these courts are reasoning too technically, and have failed to carry out the **intention of Congress,** which was to protect the farmer's property and home. Other courts have just held the opposite, and have given full protection, and carried out the **intent of Congress**". " . . . it was the **intention of Congress,** when it passed Section 75, that the debtor farmer and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefit of the act should extend to the farmer prior to confirmation of sale, and during the period of redemption and **that no proceedings after the filing of the petition should be instituted, or,** if instituted prior to the filing of the petition, **should not be maintained in any court, or otherwise."** House Report No. 1808, page 2, of the same session reads substantially the same.

In the present Seventy-Sixth Congress when proposed amendments were pending which resulted in the Act of March 4, 1940 extending Section 75 until 1944, the proposed amendments were the subject of Senate Report 1045. The following comments are found in that Report.

> Page 2: **"It was the intent of Congress,** when it passed Section 75, that the stay should be for three years provided the farmer complied with the provisions of the Act and paid the rental as fixed by the court and complied with the orders of the court.

It was never the intention of Congress that the court should arbitrarily dismiss the farmer's petition because it, the court, decided that the farmer could not pay all of his debts at the end of three years or that he was too poor to go through bankruptcy. **The intent of Congress was**, and is, that the farmer debtor is to pay the rental and have three years, not to pay all of his debts but to pay the value of the property. Very few bankrupts are able to pay all their debts."

"This new provision simply correct abuses of judicial discretion. It prevents judicial legislation. We may state further that many of the district courts and some of the Circuit Courts of Appeals and the Supreme Court have given proper construction to the language in the present Act, but we are sorry to note that others have misconstrued it."

Page 3, referring to a proposed amendment: "This is simply clarifying language. **That was the intention of Congress** in the present Section 75. Surely the practice now followed by some of the District Courts, where they permit the farmer to file his petition and to proceed under the Act for one year or more and then upon the motion of some mortgagee dismiss the proceedings and throw the farmer to the wolves, is unjustifiable."

Members of Congress who represented every portion of the Nation and were familiar with the conditions and problems pertaining to agriculture in general and to farmers in particular devised the provisions of Section 75 (o). These provisions will be found in no other law for the relief of debtors. These legislators knew that individual farmer debtors owing relatively small sums, secured by mortgages upon their entire homes and farm holdings, and having already depleted their resources in vain attempts to stave off foreclosure, could be no match for great corporate mortgage holders having access to unlimited re-

sources which could be employed in harassing litigation. They devised Section 75 (o) to maintain the status quo and to make it certain that when a farmer debtor invoked Section 75 he would be secure from all litigation while negotiating for settlement. They intended that he should be on a basis of equality with his secured creditors. Theoretical freedom to litigate between a farmer debtor and a corporate mortgage holder would be no freedom at all. It would be similar to the long exploded theoretical freedom of contract between an employee and a corporate employer.

We can not conceive how Congress could more clearly have expressed its will that every proceeding in a pending foreclosure action should be absolutely prohibited during the pendency of proceedings under Section 75 (a) to (r). It provided, in a spirit of fairness to meet some extraordinary situation where foreclosure might without harm be permitted to proceed, that by procedure in accord with due process of law through application to the judge, reference to the conciliation commissioner, hearing before the conciliation commissioner and report to the judge, the judge was empowered to authorize the foreclosure.

On the contrary, if this decision is to be the law, a designing mortgage holder may easily circumvent the national policy expressed in Section 75 (o). He may, as in this case, obtain an unlawful ex parte order from the bankruptcy court when a foreclosure sale is being advertised, purporting to authorize the sheriff to proceed. This he may do despite the fact that potential bidders, including the farmer debtor himself, who know that the foreclosure action was stopped but do not know that the judge has unlawfully told the sheriff to conduct a sale, will not attend at the date set for the sale. Having accomplished so much in defiance of law, the mortgage holder is then ready at

the first opportunity when the inhibitions of the law are lifted to pounce upon the unsuspecting farm owner and suddenly, without readvertisement of foreclosure sale, divest him of his property. It will encourage a reversion to the old repudiated "game" theory of a law suit. It will facilitate the setting of a trap for the unwary farmer-debtor upon the specious plea to the court that a sale in foreclosure is really innocuous till confirmed, (as here, see Record page 5, top of page; also Record 29, third full paragraph). The potential harm of the sale will not become apparent until confirmation when the trap is sprung.

The supposed right of appeal against such admittedly unlawful acts of both the mortgage holder and the bankruptcy court is no right at all. In the facts of this case we do not have a situation where the farmer debtor, knowing of the ex parte application by the mortgage holder for an unlawful order, and knowing that an unlawful order had been issued, stood by without raising objection. Mr. Byerly had no knowledge of the application, of the order, or of the sale until the state court purported to confirm it nine months later. He immediately applied to the bankruptcy court for redress when he learned that the law had been violated. We think he has been deprived of due process of law by such reasoning.

Among other implications of this decision, if it stands, is that a farmer debtor who invokes Section 75 (a) to (r) for composition or extension, must, while negotiating with his various creditors, keep a constant all-seeing eye upon the bankruptcy court lest without his knowledge, it unlawfully assist a secured creditor to have a foreclosure sale which the law expressly prohibits. To preserve his supposed right of appeal under Section 25 of the present Bankruptcy Act he must at all times be prepared—by effective surveillance of the bankruptcy court—to initiate an appeal

by notice to the District Court or by application to the Circuit Court of Appeals or, in the alternative, both.[1] This, like the fictitious freedom of contract under actual conditions is an impossible handicap.

We here state the number of miles a farmer debtor in each state might be required to travel **one way** from his farm to the bankruptcy court where his farmer debtor proceeding is pending. His **round trip** would be twice the distance given. For example, the longest trip to a bankruptcy court in Montana would be 918 miles. In Vermont it would be 80 miles. Alabama, 123; Arizona, 206; Arkansas, 151; California, 378; Colorado, 290; Connecticut, 53; Delaware, 105; Florida, 125; Georgia, 105; Idaho, 257; Illinois, 121; Indiana, 103; Iowa, 117; Kansas, 384; Kentucky, 125; Louisiana, 148; Maine, 220; Maryland, 85; Massachusetts, 84; Michigan, 179; Minnesota, 233; Mississippi, 178; Missouri, 181; Montana, 459; Nebraska, 189; Nevada, 411; New Hampshire, 78; New Jersey, 80; New Mexico, 419; New York, 190; North Carolina, 145; North Dakota, 195; Ohio, 142; Oklahoma, 181, Oregon, 315; Pennsylvania, 124; Rhode Island, 43; South Carolina, 107; South Dakota, 197; Tennessee, 115; Texas, 328; Utah, 318; Vermont, 40; Virginia, 105; Washington, 290; West Virginia, 190; Wisconsin, 206; Wyoming, 200.

The **one-way** distances are here arranged for fifteen states in the order of population: New York, 190; Pennsylvania, 124; Illinois, 121; Ohio, 142; Texas, 328; California, 378; Michigan, 179; Massachusetts, 84; New Jersey, 80;

Note 1: Under the Bankruptcy Act as it was when the farmer debtor proceedings in this case was pending on appeal were more cumbersome (by petition and allowance in the district court) and differences of opinion over "controversies" and "proceedings" made two appeals necessary to be certain that if one alone were taken or applied for it should prove, on objection, to have been the wrong one as was the first appeal in Wayne v. Owens—Illinois 300 U.S. 131.

Missouri, 181; Indiana, 103; North Carolina, 145; Wisconsin, 206; Georgia, 105; Alabama, 123.

The one-way distances are here arranged for fifteen states in the order of rural population: Texas, 328; Pennsylvania, 124; North Carolina, 145; Ohio, 142; New York, 190; Georgia, 105; Illinois, 121; Alabama, 123, Kentucky, 125; Missouri, 181; Tennessee, 115; Mississippi, 178; Virginia, 105; Oklahoma, 181; Michigan, 179.

The one-way distances are here arranged for fifteen states in the order of number of farms and of farmers: Texas, 328; Mississippi, 178; North Carolina, 145; Missouri, 181; Kentucky, 125; Tennessee, 115; Alabama, 123; Ohio, 142; Arkansas, 151; Georgia, 105; Illinois, 121; Iowa 117; Oklahoma, 181; Minnesota, 233, Indiana, 103.

Because we, as counsel for numerous farmer debtors in many portions of the nation, have been intimately associated for many years with the problems arising out of agricultural indebtedness, and because from the beginning we have been almost constantly involved in litigation concerning the interpretation and practical application of Section 75, we feel that we do not unduly stress the havoc in the purposeful administration of this law which will result from the present decision if it is to be the final expression of this Court. Even though it might possibly be rectified by some future decision, the almost impossible task of presenting a farmer debtor's case, for lack of funds and because of the press of litigation in this Court, makes it inevitable that many farmer debtors would be deprived of the benefits of Section 75 before another proper case could be presented.

We can not but feel that in this instance, if the farmer debtor is by the unlawful action of the bankruptcy court finally divested of his property, it was without due proc-

ess of law because he did not have his day in court to protect himself from an unlawful order of which he had no knowledge.

May 8, 1940

Respectfully submitted,

Elmer McClain,
Lima, Ohio
William Lemke,
Fargo, North Dakota,
Counsel for Carl Byerly, Respondent.

Dissent p. 1

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1939.

Union Joint Stock Land Bank of Detroit, Petitioner,
vs.
Carl Byerly.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

September 1, 1932, the petitioner instituted a mortgage foreclosure suit against respondent in the Common Pleas Court of Madison County, Ohio. The cause was prosecuted to judgment and advertisement was made of a sheriff's sale of the property to take place November 24, 1934.

November 19, 1934, the respondent filed his petition in the United States District Court under § 75 of the Bankruptcy Act,[1] and the court issued an order restraining proceedings in the foreclosure suit until the further order of the court.

November 23, 1934, the District Court, on application of the petitioner, without reference of the matter to a conciliation commissioner, modified the restraining order to permit the sale of the premises as advertised but enjoined any further proceedings, particularly confirmation of the sale or execution of sheriff's deed.

November 24, 1934, the sheriff, as permitted by the modification of the restraining order, held the sale as advertised. The petitioner bid the property in and the sheriff made return of the sale.

December 14, 1934, the District Court approved the respondent's petition under § 75 of the Bankruptcy Act and ordered a reference to a conciliation commissioner. The latter reported that no agreement could be reached between the respondent and his creditors.

February 11, 1935, the respondent abandoned proceedings under subsections (a) to (r) of § 75 and filed an amended petition to be adjudged a bankrupt pursuant to § 75(s).[2]

[1] Act of March 3, 1933, c. 204, 47 Stat. 1467, 1470.

[2] Subsection (s) was added to Section 75 by the Act of June 28, 1934, c. 869, 48 Stat. 1289.

May 27, 1935, this court held certain features of § 75(s) unconstitutional. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

August 26, 1935, on the application of the respondent, the District Court ordered that, because of the unconstitutionality of § 75(s), the respondent's petition and amended petition be dismissed and that the case be terminated.

August 28, 1935, § 75 was amended[3] to meet the decision in *Louisville Bank* v. *Radford, supra*. The Act, as so amended, provided in paragraph 5 of § 75(s):

"This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

September 10, 1935, the sheriff's sale was confirmed by the Common Pleas Court. Subsequently this action was, on appeal by respondent, affirmed by the Court of Appeals of Madison County.

September 19, 1935, the sheriff's deed was delivered to the petitioner and was recorded.

September 24, 1935, the respondent moved the District Court for reinstatement of his bankruptcy case. The motion was granted but apparently no amended petition has been filed nor any adjudication entered under § 75(s).

May 8, 1936, the petitioner moved the District Court for an order of disclaimer of the real estate in question.

October 22, 1936, an order of disclaimer was entered. October 26 a petition for rehearing was filed by the respondent and was entertained by the court.

April 17, 1937, the respondent moved the District Court that the proceedings in bankruptcy be referred to a conciliation commissioner pursuant to § 75(s).

May 6, 1937, the District Court overruled the respondent's petition for a rehearing of the order of disclaimer.

May 8, 1937, the District Court overruled the motion of the respondent to refer the cause to a conciliation commissioner.

May 27, 1937, the respondent petitioned the District Court for an appeal to the Circuit Court of Appeals from the order denying

[3] Act of August 28, 1935, c. 792, 49 Stat. 942.

his petition for rehearing of the order of disclaimer and from the order denying his motion to refer the cause to a conciliation commissioner and, on the same date, the District Court allowed an appeal.

June 3, 1937, the respondent petitioned the Circuit Court of Appeals for leave to appeal from the orders of the District Court and, June 7, 1937, leave was granted.

The Circuit Court of Appeals reversed the orders of the District Court, holding that, at the time of filing his new petition under § 75, as amended, the respondent had a property right,—a right of redemption—in the mortgaged premises, which had not been cut off by the sale and its confirmation in the State court, and that the cause should be referred to a conciliation commissioner and prosecuted before him.[4] On account of the importance of the question involved in the administration of the Bankruptcy Act, we granted certiorari.

The petitioner asserts that the court below erred, as the action of the District Court modifying the restraining order and permitting a sale of the mortgaged premises was authorized by the bankruptcy act and, if not, it is binding upon the respondent since he failed to except to or appeal from it.

The petitioner further asserts that the respondent's procurement of the termination of the original bankruptcy case amounted to a waiver of any irregularity which occurred while the proceeding was pending and precluded the respondent from objecting to such irregularity. Further, petitioner contends that the sale made by the sheriff did not change the legal status of the debtor and his property since his right of redemption, under Ohio law, remained until confirmation of the sale by the State court; and, although that court was without jurisdiction while the original bankruptcy proceeding was pending, it regained such jurisdiction by the termination of the bankruptcy case, and had exclusive jurisdiction of the parties and the subject matter, when the decree of confirmation was entered. The claim is that the decree of confirmation cannot be collaterally attacked in the bankruptcy court.

The respondent, on the other hand, argues that the express provisions of § 75, in force at the time the sale was made, rendered void the District Court's permission to make the sale and the sheriff's

[4] Byerly v. Union Joint Stock Land Bank of Detroit, 106 F. (2d) 576.

action in making it; and that confirmation or delivery of a deed can give no validity to such void action, which the bankruptcy court should, therefore, have disregarded.

First. The action of the District Court in permitting the holding of the sale was not void but voidable; and the sale made pursuant thereto was not void.

Section 75, as it stood during the pendency of the original bankruptcy proceeding, provided:

"(e) . . . . After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:"

. . . . . .

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

The provisions of subsection (p) as it was when the petition was filed have no application. That subsection was amended by the act of August 28, 1935, *supra*, to provide "The prohibitions of subsection (o) shall apply to all judicial and official proceedings in any court or under the direction of any official" . . . . This amendment was made after the dismissal of the bankruptcy case.

Exclusive jurisdiction of the debtor and his property vested in the District Court on the filing of the petition. Up to that time jurisdiction of the debtor and the mortgaged property was in the State court. Without action by the District Court the State court could not have proceeded further.[5] But without changing the status of the debtor's right of redemption the federal court gave permission to the State officer to hold the sale. The sale was, however, incomplete until confirmation by the court.[6] Until confirmed it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceeding was pending.

In view of the provisions of subsection (o), it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale.[7] But the court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order.[8] The State court and its officer, the sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally in the State court.[9]

Second. The termination of the bankruptcy proceeding restored the jurisdiction and power of the State court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.

Although the State court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the State court's procedure, it was as if no bankruptcy case had ever existed. With jurisdiction of the parties and the subject matter, the State court entered a decree confirming the sale and au-

[5] Kalb v. Feuerstein, Nos. 120, 121, Oct. T. 1939.

[6] Bassett v. Daniels, 10 Oh. St. 617, 619; Reed v. Radigan, 42 Oh. St. 292, 294.

[7] Kalb v. Feuerstein, *supra.*

[8] Compare John Hancock Mutual Life Insurance Co. v. Bartels, No. 33, Oct. T. 1939.

[9] Thompson v. Tolmie, 2 Pet. 157, 163; Voorhees v. Bank of United States, 10 Pet. 449; Florentine v. Barton, 2 Wall. 210; Cooper v. Reynolds, 10 Wall. 308; McNitt v. Turner, 16 Wall. 352, 366; Simmons v. Saul, 138 U. S. 439; Noble v. Union River Logging R. Co., 147 U. S. 165, 173; Insley v. United States, 150 U. S. 512.

thorizing a deed, the sheriff executed his deed, which was duly recorded, and the petitioner went into possession as purchaser of the mortgaged premises. Thereafter the respondent moved for reinstatement of the bankruptcy case and his motion was granted. In the interim, no bankruptcy cause was pending and the State court had jurisdiction to proceed as it did.

We cannot assent to the view advanced by the respondent that the amendment to § 75 of August 28, 1935, automatically reinstated the earlier proceeding which had been dismissed; or that the motion to reinstate the proceeding operated by relation to close the gap of twenty-nine days between the dismissal of the original bankruptcy case, and the State court's action in confirming the sale, and to deprive the latter of jurisdiction to act in the interim. The amendatory act merely authorized the reinstatement of proceedings which had been dismissed. The case is analogous to one wherein a state court foreclosure proceeding has been completed and deed delivered to the sheriff's vendee prior to the filing of a petition under § 75.[19] The provision for the reinstatement, upon the debtor's motion, of a proceeding theretofore dismissed and finally terminated, cannot affect the jurisdiction of the court conducting the foreclosure proceeding when no bankruptcy cause was pending.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131, relied upon by the respondent, is not in conflict with our decision. There a petition in bankruptcy filed under § 77B was dismissed by the bankruptcy court, not on motion of the bankrupt but at the instance of mortgage creditors and over the bankrupt's objection. In due time a petition for rehearing was filed. With notice of the filing of this petition for rehearing, and that it would be set for hearing before the bankruptcy court, the creditors took further steps in a foreclosure proceeding pending in a State court. The District Court entertained the petition for rehearing and an amended petition. The creditors who were prosecuting the foreclosure proceeding in the State court appeared and were heard in opposition.

In entertaining the petition for rehearing the District Court found that good cause existed for vacation of its order of dismissal and reconsideration of the cause; that the application for rehearing had been seasonably presented, and that no rights had vested in reliance upon its earlier order of dismissal which would be disturbed by setting aside the order.

---

[19] See *Wright* v. *Union Central L. I. Co.*, 304 U. S. 502, 508.

The petition was dismissed, the debtor appealed to the Circuit Court of Appeals and was granted a supersedeas. From an order of the Circuit Court of Appeals affirming the dismissal of the petition by the District Court the debtor sought certiorari from this court. The State court in which the foreclosure proceeding was pending had full notice of all of these facts when it proceeded to consummate the foreclosure sale. We held that, in the circumstances, no rights were acquired under the State court proceedings since termination of the bankruptcy case did not occur until final disposition of the efforts in the District Court and on appeal to reverse the decree of dismissal.

The District Court was right in refusing to refer the reinstated cause to a conciliation commissioner. Since the foreclosure proceedings had been completed and title had passed thereunder prior to the filing of the debtor's petition for reinstatement, it would have been a vain thing to refer the cause to a conciliation commissioner for administration of property which no longer belonged to the debtor.[11] We have no occasion to pass upon the authority of the court to enter an order of disclaimer. It is sufficient that the court's action in refusing to refer the cause to a conciliation commissioner was justified. That order, we think, should have been affirmed.

It is said that, even where title has passed from the mortgagor in foreclosure proceedings before the filing of the petition, the debtor should be, if he so requests, adjudicated a bankrupt so that a trustee may, if so advised, challenge the validity of the sale. Here, however, there is no suggestion of any infirmity in the petitioner's title save that the sale was made in violation of the prohibitions of the bankruptcy act. But that sale was made under leave of the bankruptcy court and it was within the State court's jurisdiction, when no bankruptcy proceeding was pending, to confirm the sale and order delivery of a deed. If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding. The fact is that the debtor appealed from the confirmation of the sale to the Court of Appeals of Madison County, Ohio, which affirmed the decree of the Common Pleas Court. An issue of fraud alleged to have been practiced upon the debtor to obtain his withdrawal of his original bankruptcy proceeding was there finally decided against him.

The judgment of the Circuit Court of Appeals must be reversed.

So ordered.

[11] Compare Wright *v.* Union Central L. I. Co., *supra.*

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1939.

Union Joint Stock Land Bank of Detroit, Petitioner, *vs.* Carl Byerly. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1940.]

Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy, dissenting.

We believe that to deny this farmer the benefits of the Act because the purchase by the mortgagee at the Sheriff's sale was confirmed during the short interval between the dismissal of his petition and its reinstatement, would be largely to defeat the purposes of the Act.

After the original subsection (s) of the Frazier-Lemke Act was declared unconstitutional by the decision of this Court, May 27, 1935,[1] this farmer's petition was dismissed, August 26, 1935. A scant two days after the dismissal, August 28, Congress enacted the present Frazier-Lemke Act designed to supply the constitutional deficiency and providing that all cases dismissed because of that decision "be promptly reinstated."[2] After the filing of the petition and even before dismissal, the bankruptcy court allowed this farmer's property to be sold by the Sheriff under foreclosure in the State Court. And it is admitted that the order purporting to permit that sale was erroneous because entered in disregard of the requirements of subsection (o).[3] The Ohio State court confirmed the Sheriff's sale, September 10, 1935, a date prior to the lapse of the thirty day period within which an appeal would lie from an order of dismissal.[4]

Instead of appealing, the farmer, within the thirty day period, prayed relief from the dismissal decree by reinstatement in the

[1] Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555.

[2] 75 (s) (5).

[3] As we view the effect of reinstatement, it is unnecessary to determine whether the bankruptcy court's order was not merely erroneous, but void.

[4] 11 U. S. C. 47, 48.

District Court itself. In his application for reinstatement, he alleged that dismissal of his petition had been induced by the deliberate misrepresentations of the mortgagee-bank, that he had no notice of the consummation of the Sheriff's sale until several days after it took place and that he wished to avail himself of Section 75 as amended August 28. Upon the prayer "that his . . . proceeding . . . be reinstated as of the date of its . . . . dismissal," the case was reinstated. We do not understand that either the power of the bankruptcy court to reinstate or the reinstatement which was in fact granted, is questioned.

Until disposition of the farmer's petition, he was entitled to the protection and benefit of the Act, and the bankruptcy court had exclusive jurisdiction of his property.[5] Dismissal of the proceeding did not constitute its final disposition where reinstatement was available. Certainly, this must hold true at least for the period of time after dismissal during which the farmer had a statutory right to appeal from the District Court's action.[6] Otherwise, even appeal might be wholly unavailing and futile. When a court of bankruptcy reinstates a case previously retired from the docket, as this farmer's case was reinstated, the court reconsiders the cause on the merits upon the *original* as well as any supplemental petitions unless rights have "intervened which would render it inequitable to reconsider the merits." *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137, 138. We find no intervening equities here.

In the *Wayne* case, a corporate reorganization in 77(b) was dismissed and subsequent to the dismissal a State court confirmed a foreclosure sale of the debtor's property which had been decreed prior to the filing of the 77(b) proceeding. After the Circuit Court of Appeals had denied the debtor's petition for allowance of an appeal and the time for appeal as of right had expired, the bankruptcy court reinstated the proceeding and reheard the case upon

---

[5] Kalb v. Feuerstein, — U. S. —.

[6] "An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of. . . . When the final judgment was reached it determined the rights of . . . [the parties] *ab initio*, . . ." MacKenzie v. Engelhard Co., 266 U. S. 131, 143. "Where a decree has not been enrolled, or where it is subject to modification upon motion, or where the court might grant a rehearing, or where an appeal might be taken, or where the costs had not been taxed, or where no execution had issued, it not being in condition to issue execution, . . . the case could not be said to have reached that stage where it could be said it was not pending in that court." Brannon v. Commonwealth of Kentucky, 162 Ky. 350, 357-8. Cf. State v. Tugwell, 19 Wash. 238, 43 LRA 717; Bloom v. People, 23 Colo. 416; State *ex rel.* Andreu v. Canfield, 40 Fla. 36, 44; Brown v. Campbell, 100 Cal. 635, 646; Ex parte Howland, 3 Okla Crim. 142, A. C. 1912, 840.

the merits. The plan of reorganization was again found wanting and the court entered a second order of dismissal. The debtor's appeal from the second dismissal was in turn dismissed by the Circuit Court of Appeals on the ground that lack of power in the District Court in bankruptcy rendered the order of reinstatement—as well as the second order of dismissal—void.[7]

When the case reached here, arguments presented by the foreclosure purchaser were in substance those upon which we are now asked to reverse the court below—that the first order of dismissal had terminated the cause (so that an appeal not taken within thirty days of its entry was not timely); and that the State court's confirmation of sale, after dismissal, had finally divested the bankrupt of all title to its foreclosed property, leaving no property for administration by the bankruptcy court (and the controversy was therefore moot).

This Court denied these contentions, and held that the dismissal had not terminated the proceeding; that the controversy was not moot and that the District Court had properly found that no intervening rights had accrued to divest the debtor of its property foreclosed subsequent to the dismissal in the bankruptcy court; that the rehearing had been sought in good faith and with due diligence and that the Circuit Court of Appeals had erred in not passing upon the merits of a plan of reorganization which included the property sold under the State court's order. The decision here thus approved the exercise of the bankruptcy court's jurisdiction over the encumbered property of the debtor which, after dismissal, had been bought in the State court foreclosure by creditors who were parties to the 77(b) proceedings and who "went forward with the proceedings in the State court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted . . . ." *Id.*, 135.

Accordingly, the case was not remanded to the District Court for reconsideration of its finding that no rights cognizable in equity had intervened as a result of the State court foreclosure. Instead, the remand went to the Court of Appeals for further proceedings. And that Court properly construed the mandate to require consideration of the merits of the debtor's plan which assumed ownership in the debtor of the particular property upon which foreclosure had been attempted.[8]

---

[7] 84 F. (2d) 965.

[8] Wayne Gas Co. v. Owens-Illinois Glass Co., 91 F. (2d) 827.

So here, as in the *Wayne* case, State court proceedings subsequent to dismissal, but while further proceedings could be had in bankruptcy, did not divest the debtor of his property; there "was no abuse of sound discretion in granting the motion [for reinstatement] and reconsidering the cause"; the district court in bankruptcy had "the power for good reason, to revise its judgment [of dismissal and to reinstate] upon seasonable application and before rights . . . [had] vested on the faith of its action."[9] *Id.*, 137, 138. And its general power to do so at least during the period allowed for taking an appeal was reinforced by recognition of the specific statutory right of reinstatement in the amended 75(s), which sprang into being only two days after dismissal of this farmer's petition. Paralleling the situation presented by the *Wayne* case, not only was the mortgagee-purchaser here a party to the 75 proceeding, but the State court itself may be said to have acted with knowledge that the dismissal—of which it was notified—did not necessarily represent the last step in the Federal court proceeding. Cf. *Id.*, 135.

Here, the only asserted rights which intervened against this farmer-debtor were not those of a *bona fide* purchaser. The purchaser was the mortgagee who was a party to the Section 75 proceeding and who relied—at least in part—on an order of the bankruptcy court admittedly erroneous because contrary to the Frazier-Lemke Act, and rendered at the mortgagee's instigation. Therefore, the mortgagee-purchaser is not entitled to rely upon the status acquired by it in the State court after dismissal as precluding further consideration of the petition for composition. Cf. *Id.*, 135. To decide otherwise than that the dismissal here did not deprive the farmer-debtor of the right to proceed—before rights have vested—by reinstatement to obtain the benefits of the Act, is to permit dismissal at the instance of the farmer's creditors and without the farmer's knowledge to prove a ready means of circumventing the Act.[10] Title to a farmer's property acquired in the manner pursued by petitioner cannot limit the power of the bankruptcy court to afford the protection of and to enforce this remedial legislation.

---

[9] See note 6, *supra.*

[10] Cf. In re Price, 99 F. (2d) 691, 694.